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Record No. 5069

In the Supreme Court of Appeals of Virginia at Richmond

ENLOW AND SON, INC., ET AL.

v.

L. HAROLD HIGGERSON, ET AL., ETC.

FROM THE CIRCUIT COURT OF NORFOLK COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5069

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 10th day of September, 1959.

ENLOW AND SON, INC., ET AL., Appellants,

against

L. HAROLD HIGGERSON, ET AL., ETC., Appellees.

From the Circuit Court of Norfolk County

Upon the petition of Enlow and Son, Incorporated, Lewis K. Kesser and R. A. Emanuelson an appeal is awarded Enlow and Son, Incorporated, and an appeal and *supersedeas* is awarded Lewis K. Kesser and R. A. Emanuelson by the Chief Justice of the Supreme Court of Appeals on September 8, 1959, from a decree entered by the Circuit Court of Norfolk County on the 18th day of February, 1959, in a certain motion for judgment then therein depending wherein L. Harold Higgerson and Ivan Higgerson, Partners, trading as Higgerson Brothers, were plaintiffs and the petitioners were defendants; upon Enlow and Son, Incorporated, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

And it appearing that a *supersedeas* bond in the penalty of thirty thousand dollars, conditioned according to law has heretofore been given by Lewis K. Kesser and R. A. Emanuelson in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required of them.

RECORD

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REPORT.

To the Honorable Edward L. Oast, Judge of said Court:

In obedience with a decree entered herein on the 4th day of March, 1957, upon reference to me as one of the Commissioners in Chancery of this Court and by agreement of counsel for all parties in this cause, all parties being represented by counsel, I proceeded on the 30th day of May, 1957 to take the depositions of witnesses, and the case was continued from time to time on the following dates listed, at which time depositions were taken or by agreement of counsel, the case was continued to a succeeding date: September 3, 1957, September 10, 1957, December 12, 1957, January 6, 1958, March 15, 1958, May 22, 1958 and June 13, 1958.

Depositions so taken are returned herewith together with the exhibits filed by the parties in evidence.

Oral argument by counsel was heard on June 13, 1958 and written briefs filed by counsel on June 13, 1958, June 24, 1958 and June 27, 1958, are also returned herewith.

Upon careful examination of the evidence, pleadings and matters of record, I report as follows:

1. What sum, if anything, is due and owing by the defendant, Enlow and Son, Incorporated, to the plaintiffs.

Your Commissioner finds that Enlow and Son, Incorporated owes the complainant, L. Harold Higgerson and Ivan Higgerson, Partners, trading as Higgerson Brothers, the sum of Twenty-five Thousand Seven Hundred One and eighty-two hundredths ($25,701.82) Dollars. The above sum is allowed on proof of the following items, which your Com-
page 97 } missioner finds is due by the defendants to the plaintiffs:

Payroll advances	$ 7,450.00
Advances for trade creditors	17,650.55
Unpaid accounts	2,822.23
Withholding tax	878.85
Social Security	512.26
Virginia Unemployment	345.78
Federal Excise	38.42
	$29,698.09
Profit guaranteed by contract	3,000.00
One-half of cash discounts	437.49
	$33,135.58
Credit payment from Ritter on contract	7,433.76
Amount due Higgerson	$25,701.82

2. The liability, if any, of Lewis K. Kesser and R. A. Emanuelson for any claim which may be due and owing by Enlow and Son, Incorporated, to the plaintiffs.

Lewis K. Kesser and R. A. Emanuelson were sureties under the contract dated July 1, 1955 and as such are primarily liable to the plaintiffs, L. Harold Higgerson and Ivan Higgerson, Partners, trading as Higgerson Brothers, in the amount of $25,701.82. Paragraph Six (6) of the said contract, which is "Plaintiff's Exhibit #2" stated: "As a further provision of surety, the Undersigned, R. A. Emanuelson and Lewis K. Kesser do sign this agreement with the express stipulation that they together with Enlow and Son, Incorporated will save Higgerson Brothers harmless from all claims, liabilities not covered by the insurances noted to be obtained in the paragraph 5."

3. What sum, if anything, due and owing by the plaintiffs to Enlow and Son, Incorporated, on its Cross-Claim filed herein.

There is no sum of money due by the plaintiffs to Enlow and Son, Incorporated on the defendants' Cross-Claim filed herein.

There is no merit to the contention that the plaintiffs owed rental for equipment, since under the terms of the contract,

Higgerson Brothers were to charge all such expenses to Enlow and Son, Incorporated. The evidence indicated
page 98 } that the plaintiffs substantially complied with their obligations under the agreement and that Enlow and Son, Incorporated failed to perform all of the work specified in "State Project 1864-70-72 B. P. R. A. U.—119 (1)" awarded to Higgerson Brothers by T. E. Ritter Corporation and, in fact, abandoned the job, making it necessary for the plaintiffs to complete the work.

4. Whether plaintiffs have a right to maintain this action and whether or not they are in violation of Section 54-113 of the Code of 1950, as amended, and the Supplemental Sections of said Code, requiring the registration of contractors handling contracts in excess of $20,000.00, and whether the defendant, Enlow and Son, Incorporated, is in violation of said provisions of the statute and entitled to maintain its Cross-Claim herein.

Your Commissioner finds that the plaintiffs have the right to maintain this action and that they are not in violation of Section 54-113 of the Code of Virginia 1950, as amended and the Supplemental Sections of said Code. Enlow and Son, Incorporated represented to Higgerson Brothers at the time the contract was made for the performance of the work, that the corporation had applied for registration with the State Registration Board for Contractors.

While the law appears to be well settled in Virginia that "a failure to comply with the statute precludes recovery by the contractor on his contract," which is an interpretation of *Bowen Electric Company* v. *Foley,* 194 Va. 92, as laid down in *Rohanna* v. *Vazzana,* 196 Va. 549, and referred to in *Cohen* v. *Mayflower Corporation,* 196 Va. 1151, it does not appear that the Court has anywhere held that a contractor who began his operation without registering and had applied for registration and was later registered, as in this case, would be precluded from asserting a legal claim.

Since no award is being made in favor of the defendant corporation, Enlow and Son, Incorporated, in this case, it appears to be purely a legal question, but your Commissioner is of the opinion that the registration by the con-
page 99 } tractor during the progress of the work under the contract would give him an unquestioned right to maintain a cross-claim in this cause.

5. Whether a partnership existed between plaintiffs and Enlow and Son, Incorporated, for the conduct of the work set out in the contract attached to the original Motion for Judgment filed herein, and the liabilities owing by either to the other.

A partnership did not exist between the plaintiffs and Enlow and Son, Incorporated. The contract which is in evidence as "Plaintiff's Exhibit #2" and all evidence relative to the consummation of the contract which has been offered, clearly shows that the rights of the plaintiffs were transferred to the defendant corporation in consideration of a determinable sum of money based on contingent developments and that the plaintiffs were to perform certain services for the defendant corporation at the expense of the defendant corporation. The necessary elements of partnership were not present.

The liabilities have been answered in questions one (1) and three (3), *supra.*

Respectfully submitted,

GORDON F. MARSH
Commissioner in Chancery.

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DECREE.

This cause came on this day to be again heard upon the papers formerly read and upon the report of Gordon F. Marsh, Commissioner in Chancery, to whom this cause was referred for report, filed in the Clerk's Office of this Court on September 10th, 1958, together with the evidence taken, and the exhibits, after notice to counsel for all parties who have appeared in this cause; upon the exceptions filed to said report by R. A. Emanuelson, Enlow and Son, Incorporated, and Lewis K. Kesser, and which exceptions, after argument of counsel, are overruled by the Court; and it appearing from said report that Enlow and Son, Incorporated, is indebted to L. Harold Higgerson and Ivan Higgerson, Partners, trading as Higgerson Brothers, in the sum of Twenty-five Thousand

Seven Hundred and One Dollars and Eighty-two Cents ($25,-701.82), with interest from November 1st, 1956, and the costs of this suit; that Lewis K. Kesser and R. A. Emanuelson, as sureties on the contract of July 1st, 1955, are primarily liable to the plaintiffs for said sum; that there is no sum of money due by plaintiffs to Enlow and Son, Incorporated, on the Cross-Claim filed by it in this suit, and that there page 107 } is no merit to the contention that the plaintiffs owe rental for equipment to Enlow and Son, Incorporated; that the plaintiffs have a right to maintain this action and they are not in violation of Section 54-113 of the Code of Virginia 1950, as amended, and the supplemental section of said Code; that a partnership did not exist between plaintiffs and Enlow and Son, Incorporated; and it further appearing that the Commissioner's fee in said case for said report is $750.00, the amount paid by the plaintiffs to the court reporter, Kottal, for depositions is $153.85, and the amount paid by defendants to court reporter, Knight, is $230.35, which sums should be taxed as costs in this case.

UPON CONSIDERATION WHEREOF, the Court doth confirm the report of Commissioner Marsh and doth ADJUDGE, ORDER and DECREE that L. Harold Higgerson and Ivan Higgerson, Partners, trading as Higgerson Brothers, are awarded a judgment against Enlow and Son, Incorporated, and Lewis K. Kesser and R. A. Emanuelson, as sureties, in the amount of $25,701.82, with interest from November 1st, 1956, until paid, together with the costs of this suit, including the above mentioned Commissioner's fee and court reporter's fees; that the Cross-Claim filed by Enlow and Son, Incorporated, against the plaintiffs is dismissed, and the Clerk is directed to docket the aforesaid judgment in the current Judgment Book and index the same in the current index to judgments, to all of which action of the Court the defendants, by counsel, duly excepted; and the defendants having signified their intention to apply to the Supreme Court of Appeals of Virginia for an appeal from this decree, it is ORDERED that the enforcement of said judgment be suspended, for a period of sixty days, upon defendants or someone for them executing bond before the Clerk of this Court, with surety deemed sufficient by said Clerk, in the penalty of $30,000.00, conditioned according to law.

And this cause is removed from the docket.

Enter Feb. 18-1959.

E. L. OAST.

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ASSIGNMENTS OF ERROR.

Pursuant to the Rules of the Supreme Court of Appeals of Virginia, defendants hereby designate as their Assignments of Error, the following:

1. The Court erred in finding that the plaintiffs had substantially complied with their obligations under the agreement with defendants.
2. The Court erred in finding that the defendant, Enlow and Son, Incorporated, had failed to perform its obligations as per contract with plaintiffs.
3. The Court erred in finding that plaintiffs had the right to maintain this cause and were not in violation of Section 54-113, et seq., of the 1950 Code of Virginia, as amended.
4. The Court erred in finding that a partnership did not exist between the plaintiffs and defendants, Enlow and Son, Incorporated.
5. The Court erred in not holding that the contract between the plaintiffs and T. E. Ritter Corporation was non-assignable.
6. The Court erred in finding that no sum of money was due by the plaintiffs to Enlow and Son, Incorporated on the cross-claim filed in this cause.

page 112 } 7. The Court erred in disallowing Enlow and Son, Incorporated claim for rental of equipment furnished by said Enlow and Son, Incorporated.

8. The Court erred in finding that Enlow and Son, Incorporated was indebted to the plaintiffs in the sum of Twenty-five Thousand Seven Hundred and One Dollars and Eighty-two Cents ($25,701.82) and awarding judgment for such amount.
9. The Court erred in finding that Lewis K. Kesser and R. A. Emanuelson were sureties under the contract dated July 1, 1955.
10. The Court erred in finding that Lewis K. Kesser and R. A. Emanuelson were liable to the plaintiffs in the sum of Twenty-five Thousand Seven Hundred and One Dollars and Eighty-two Cents ($25,701.82), and awarding judgment for such amount.

Harold Higgerson.

11. The Court erred in entering the Final Decree dated February 18, 1959.

ENLOW AND SON, INCORPORATED
AND LEWIS K. KESSER
By JERROLD G. WEINBERG
Of Counsel.

R. A. EMANUELSON
By GORDON E. CAMPBELL
Counsel.

* * * * *

Dep.
5-30-57
page 2 } MR. HAROLD HIGGERSON,
one of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Kellam:

Q. Please state your name, age, residence, and occupation.

A. Harold Higgerson, 42, contractor, and I live at Hickory, Virginia.

Q. How long have you been engaged in the contracting business?

A. Since 1945.

Q. What is the trade name of your business?

A. Higgerson Brothers.

Q. Who constitutes the partnership?

A. Ivan Higgerson and Harold Higgerson.

Q. You are brothers?

A. Yes, sir.

Q. Mr. Higgerson, is your company or partnership registered with the State Board of Contractors?

A. Yes, sir.

Q. How long has it been registered?

A. Four to five years.

Mr. Fine: Do you have a copy of the certificate of registration?

Harold Higgerson.

A. I haven't got it with me.

Mr. Kellam: We will get it for you and put it in the record.

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Q. Did your company enter into a contract with T. E. Ritter Corporation on or about June 28, 1955 to do some work for them as subcontractors?

A. Yes, sir, we did.

Mr. Kellam: Have you seen the contract?

Mr. Fine: I never have. (Mr. Fine examines contract.) Is this the contract?

Mr. Kellam: This is the contract entered into between Higgerson Brothers and Richter.

Mr. Fine: We object to it. It is not duly accepted.

Mr. Kellam:

Q Mr Higgerson, I hand you a contract dated June 27, 1955 in the form of a letter written by the T. E. Ritter Corporation to Higgerson Brothers and ask you if that is a contract which your company entered into with Ritter.

A. Yes, sir, it is.

Q. Was the contract ever accepted by your company?

A. Yes, sir.

Q. Did it post the performance bond required under the contract?

A. We did.

Mr. Kellam: We offer that in evidence.

The Commissioner: "P-1."

Mr. Fine: May it please the Court, we object because no formal acceptance of that was made.

The Commissioner: Exception noted.

Mr. Kellam:

Q. What was the nature of the work to be done, Mr. Higgerson?

Mr. Fine: Object to that. Contract speaks for itself.

Dep. 5-30-57 page 4

Mr. Kellam:

Q. Answer the question.

Harold Higgerson.

A. Installing storm sewer, storm drain.

Q. After the contract was let to you by the T. E. Ritter *Coporation,* did you have any conversation with Mr. Enlow?

A. What? In regard to the contract?

Q. To the performance of this work.

A. Yes.

Mr. Fine: We object to the conversation on the ground if there was a contract, it would be merged into a written agreement.

Mr. Kellam:

Q. What was the conversation which you had with Mr. Enlow, Mr. Higgerson?

A. He called me and said that he understood we were looking for someone to sub some pipe to.

Q. What do you mean by "sub"?

A. Sub-contract it. Perform. Install it.

Q. Were you interested in having somebody do the work under that contract?

A. We were.

Q. Why?

A. We had obtained other work and it was more work than we could do.

Q. Following that call from Mr. Enlow, what, if anything, took place?

Dep. 5-30-57 page 5 } A. I took the plans and specifications and met him. Came over to the Hamilton Bypass job which was the work to be performed, showed him the job, and left the plans and specifications.

Q. What happened after that?

A. He later called me and gave me a price for the job.

Q. Then what occurred? What did you say to him about the price?

A. I told him that the price was a little higher than what we had in the job.

Q. When you say "What we had in the job," what do you mean?

A. That means the unit price or the total price of the job.

Q. You mean the price which Mr. Enlow gave you was higher than your contract with Ritter.

A. Yes, sir.

Q. What did he say then?

Harold Higgerson.

A. He said, "Well, I thought maybe we could get together on the job." We met at a later date in Mr. Kesser's office and went over the job.

Q. Where is his office, Mr. Kesser's office, located?

A. Adams Building on City Hall Avenue.

Q. Where?

A. Norfolk.

Q. Who suggested that you meet there?

A. Mr. Enlow.

Q. Who selected the time or was a time agreed upon?

A. He made the appointment with Mr. Kesser.

Dep. 5-30-57 page 6

Q. Who, if anyone, did he say wuold be there?

A. Kesser and Emanuelson.

Q. Did he say why?

A. He said Kesser was a lawyer and also a stockholder in the company and Mr. Emanuelson was a stockholder.

Q. Who is Mr. Kesser?

A. He is an attorney.

Q. What Kesser are you speaking of?

A. Lewis Kesser.

Q. He is the gentleman sitting here today?

A. Yes, sir, right across the table.

Q. Who is Mr. Emanuelson?

A. He is a hardware and plumbing supply man.

Q. Is he the gentleman who is here today?

A. Yes, sir.

Q. Did you know Mr. Kesser and Mr. Emanuelson prior to this time? To the meeting?

A. No. Yes. I had met them before this particular time.

Q. When you met at the office of Mr. Kesser, what discussion was had in connection with a proposed contract?

A. I told him I would take 5% for the job plus a surety.

Q. When you say 5%, what do you mean?

A. 5% of the total contract.

Mr. Fine: May it be stipulated that we object to all the conversation preliminary to the entering into the contract on the ground that the contract is the best evidence and all evidence prior to the making of the contract is irrelevant, incompetent, and immaterial because it has been reduced to writing and the conversations and preliminaries are not part of the liability in this case. It is so understood so I won't interrupt.

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Harold Higgerson.

The Commissioner: All right.

Mr. Kellam:

Q. What, if any, answer did they give you to the suggestion that you would take 5%?

Mr. Fine: I object to that on the further ground that that doesn't speak for all of them. If the question is proper, it ought to be "Who spoke" instead of "they."

A. Mr. Kesser said he thought I was entitled to more than 5%. He said he would be willing to give $6,000 for the job if the job made $6,000. In the event it didn't make $6,000, I would get $3,000 for the job.

Mr. Kellam:

Q. What assurance, if any, did you ask on any contract?

A. I wanted a surety, a performance bond. Mr. Kesser said he and Ray would personally indemnify the contract themselves.

Q. On your contract with Ritter had you given a performance bond?

A. I did, sir.

Q. Had you had any discussion with Mr. Enlow as to the ability of Mr. Emanuelson and Mr. Kesser? I am speaking about to perform?

A. Well, he just made the remark that they had the means.

Dep. 5-30-57 page 8

Mr. Campbell: Object. What conversation he may have had with Mr. Enlow as it pertains to Mr. Emanuelson is hearsay testimony. We object to that.

Mr. Fine: May we also note an exception on the ground that it is hearsay as to Mr. Lewis Kesser.

Mr. Kellam:

Q. What did he say about those gentlemen, Mr. Higgerson?

A. He said they were well-fixed gentlemen. He told me about the business they were in.

Q. Was the contract then reduced to writing?

A. It was.

Q. When was it reduced to writing? Was it that day or later?

A. That day when we were up there.

Q. Was it then signed?

Harold Higgerson.

A. Yes, it was.

Q. Following the time when the contract was reduced to writing and signed, was the work undertaken by Enlow and Sons?

A. Will you repeat the question, please?

Q. After the contract had been reduced to writing and signed, was the work then undertaken by Enlow and Sons?

A. It was, sir.

Q. At that time, was there any discussion about whether or not Enlow and Son was a registered contractor?

A. There was some discussion.

Q. What was it?

A. They said they had applied for their registration and Mr. Kesser assured me that they would take care of it, that they would get it.

Dep. 5-30-57 page 9

Q. Who was present when that discussion took place?

A. Mr. Enlow, Mr. Kesser, and Mr. Emanuelson.

Q. Who made the statement, if you recall, that they had applied for their registration?

A. Mr. Kesser.

Q. Did you rely on that at all?

A. I did. Mr. Kesser, being a lawyer, I relied on it.

Mr. Fine: Object. That question is improper. I ask the Commissioner and the Court to disregard the probative value of the question and answer.

Mr. Kellam:

Q. What occurred after Mr. Kesser made the statement to you that he would assure you they would get their registration?

A. Repeat that, please.

Q. What occurred after the discussion of the registration of their company and the statement by Mr. Kesser to you that he would assure you they would get their registration?

A. We entered into the contract.

Q. Without such a statement, would you have entered into the contract with them?

A. No, sir.

Q. Would you have entered into the contract if there had not been some guarantor or surety given for the performance of it?

A. I would not.

Harold Higgerson.

Mr. Kellam: You gentlemen have copies of the contract, I believe. (Mr. Fine and Mr. Campbell examine contract.)

Dep.
5-30-57
page 10 } Mr Kellam:
Q. I hand you what purports to be a contract dated July 1, 1955 between Enlow and Sons, Incorporated as party of the first part, Ivan Higgerson and Harold Higgerson, partners, trading as Higgerson Brothers as parties of the second part.

Mr. Fine: Let me interrupt, please. We object to the introduction of the contract as not in accordance with the statute of Virginia in violation of the statute of Virginia and not binding on the parties because instead of it being a contract, it is in reality, if it is a contract, the partnership, the joint venture is incompetent and irrelevant in these proceedings and may—

Mr. Kellam: For the record, show what statute you are talking about.

Mr. Fine: The registration statute with regard to building.

Mr. Kellam: You mean for contractors?

Mr. Fine: Yes, which we have stated in our grounds of defense for the further reason that it is not a contract other than one of partnership between Enlow and Sons, Incorporated and the Plaintiffs, and therefore, not a proper proceeding in this matter.

Mr. Kellam:
Q. Mr. Higgerson, the contract which I just said I was handing to you, look at it and see if that is the contract which was entered into between the parties.

Dep. A. It is, sir.
5-30-57 Q. Was it signed by Enlow and Sons on behalf
page 11 } of any person?
A It was signed by H. A. Enlow for Enlow and Son, Incorporated.

Q. Were any copies of the contract ever signed by Higgerson Brothers accepting it?

A. Yes, sir. I signed one accepting it.

Q. Who else, if any person, signed that contract?

A. Mr. Emanuelson and Mr. Kesser.

Mr. Kellam: We offer that in evidence.

Harold Higgerson.

The Commissioner: "Plaintiff's Exhibit 2."

Mr. Kellam:

Q. Following the time when this contract was signed, did Enlow and Sons, Incorporated undertake the performance of the work called for by the contract?

A. Yes, sir.

Q. Were any payments made by T. E. Ritter Corporation under the contract which was entered into between Higgerson Brothers and Ritter?

A. Yes. T. E. Richter paid Higgerson Brothers.

Q. What did Higgerson Brothers do with the sums received from the contract payments from Ritter?

A. It was deposited to the account of Enlow-Higgerson in the Bank of Commerce; National Bank of Commerce.

Q. Where was any provision made for the opening of that account?

A. Made at the National Bank of Commerce on Main Street.

Dep. 5-30-57 page 12

Q. How did it happen that such an account was opened?

A. How did it happen?

Q. Yes. Was there any agreement to open that account?

A. Yes. We made—

Mr. Fine: Object to that as leading.

Mr. Kellam:

Q. Look at the contract and see if there is any provision about it, Mr. Higgerson.

A. Yes, sir; provision in here for it.

Q. In the contract?

A. Yes, sir.

Q. Who signed the checks?

A. Mr. Enlow and myself.

Q. Did you enter into any partnership with Enlow and Sons, Incorporated for the performance of this work?

A. I did not, sir.

Q. Was there ever any discussion of entering into a partnership with them?

A. No, sir.

Q. Following this time when the contract was signed and the work undertaken, did you from time to time inspect the work which was being done?

Harold Higgerson.

A. Yes. I inspected it occasionally; approximately once a week.

Q. Did you ever have any conversation with Mr. Enlow relative to the progress of the work?

A. Yes. I asked him how he was getting along. I could see he wasn't getting along so good. He said, "We are going to get straight and tomorrow will be a better day."

Dep. 5-30-57 page 13

Q. Did you have any correspondence with them as to the progress of the job?

A. I think we wrote them one or two letters in regard to the progress.

Q. Mr. Higgerson, was the contract completed?

A. Yes, it was completed.

Q. Who completed it?

A. I had to get Carter and Correll to complete the catch basins.

Q. Did Enlow and Sons perform the work required of them under the contract of July 1, 1955?

A. They didn't perform all of it, no, sir.

Q. Approximately what percentage of the work did they perform?

Mr. Fine: Object to that. Percentage is not material in this case. It is a question of what they did or did not do.

A. Between approximately 90% and 95%.

Q. Why, if you know, did they not complete the work?

A. They said they had other work to do.

Q. Did you ask them to leave the job?

A. No, sir, I did not.

Q. Did you ever direct them to leave the job?

A. No, sir, I did not.

Q. Did you authorize or direct anyone to ask them to leave the job?

A. No, sir, I did not.

Q. Did you ask them to complete the job?

A. Yes, sir.

Q. After they left the job, you said you had someone else perform the work. Why were the particular people selected to perform the work?

Dep. 5-30-57 page 14

A. They had similar work that Mr. Enlow was doing on the same contract. I figured it would be cheaper to get them to do it since they had the personnel and equipment on the job to do it.

Harold Higgerson.

Q. The people selected, tell us whether or not they are capable contractors?
A. They are, sir.

Mr. Fine: Object to that. Object on the ground that it is not material or relevant or competent.

Mr. Kellam:
Q. Mr. Higgerson, was the price charged or paid to Carter and Correll a fair price for the work which they did?
A. Yes, sir.

Mr. Fine: Object on the ground that it is a conclusion of law and not a proper method of proving.

Mr. Kellam:
Q. Are you familiar with the work which they did?
A. Yes, sir.
Q. Are you familiar with the cost of doing such work?
A. Yes, sir.
Q. Was it done on a unit price or on some different basis?
A. On a unit price.
Q. How did the unit price paid to them compare with the unit price called for by the Ritter Contract?
Dep. 5-30-57 page 15
A. Approximately the same thing.
Q. I hand you a copy of a letter of July 2, 1956, addressed to Enlow and Sons, Incorporated, care of Mr. H. A. Enlow, same address to Enlow and Sons, Incorporated, care of Mr. Lewis K. Kesser, Secretary, in care of Mr. Enlow as president, and ask you if that letter was ever written and mailed to those parties?
A. Yes, sir.
Q. Was that letter written by or at your direction?
A. Yes, sir.
Q. Was it sent registered mail?
A. Yes, sir.
Q. There is attached to it a receipt signed H. A. Enlow and Sons by Mr. H. A. Enlow and two receipts for certified mail, one showing it was sent to H. A. Enlow and Sons at Route 3, Norfolk, Virginia, and the other one to Mr. H. A. Enlow and Sons, Adams Building, Norfolk, Virginia.

The Commissioner: You want that marked? "Plaintiff's Exhibit 3."

Harold Higgerson.

Mr. Kellam:
Q. Has the contract been completed?
A. Yes, sir.
Q. Did you ever write Enlow and Son, Mr. Emanuelson, and Mr. Kesser in connection with the progress of the work under the contract?
A. Yes, sir.

Dep. 5-30-57 page 16 } Q. I hand you a letter dated September 11, 1955 addressed to each of the three and ask you if that is a copy of the letter that was written to them?
A. Yes, sir. That's the letter.

Mr. Kellam: We offer this in evidence.
The Commissioner: "Plaintiff's Exhibit 4."

Mr. Kellam:
Q. Mr. Higgerson, who kept the records in connection with the funds received and expended on this job?
A. Mr. Leon Hodges.
Q. Is he here with the records today?
A. Yes, sir, he is.
Q. Are you familiar with the details of those records at all?
A. No, sir, I am not.
Q. Have you received $6,000 as the percentage or portion of the contract due you?
A. No, I have not.

Mr. Fine: We object to that as leading.

Mr. Kellam:
Q. Have you received any sum?
A. No, sir, I have not.
Q. Who furnished the money to commence the job?
A. I did. We did.
Q. Approximately how much money was advanced before any sums were received under the contract between Ritter and Higgerson Brothers?
A. I don't know the exact dollars.
Q. Approximately what was it?

Dep. 5-30-57 page 17 } Mr. Fine: We object to the question on the ground we are dealing with approximation.

Harold Higgerson.

A. I do not know the approximate amount.

Mr. Kellam:
Q. Do you know whether or not any discounts were saved on the bills?
A. Yes, they were.
Q. Have you received any sums as a fee or commission to you from any discounts received?
A. I have not, sir.
Q. In addition to work done by Carter and Correll, was any work done by any other company towards the completion of the original contract?
A. Yes, sir.
Q. By who?
A. Portsmouth Paving.
Q. What was the nature of the work which they did?
A. Repairing street where the pipe had been installed.
Q. The work which was done by Portsmouth Paving Company, was that work called for to be done under the contract between Higgerson brothers and Enlow?

Mr. Fine: Object to that . Contract speaks for itself. Matter of opinion.

A. They were to perform all work under our contract with the T. E. Ritter Corporation and that was a part of the contract.

Dep.
5-30-57 Mr. Kellam:
page 18 } Q. The Portsmouth Paving Company, tell us whether or not it is a competent firm of contractors to do the work which it did do?
A. Yes, sir.

Mr. Fine: Object to that as a matter of conclusion. Matter of legal opinion.

Mr. Kellam:
Q. Are you familiar with the work done by Portsmouth Paving Company?
A. Yes, sir.
Q. Was the price which was charged by them a fair and reasonable price for the work done?
A. Yes, sir.

Harold Higgerson.

Mr. Fine: Object to it as a legal conclusion.

Mr. Kellam:

Q. Has Enlow and Sons, Incorporated paid to Higgerson Brothers any sums due to them under the contract of July 1, 1955?

A. Would you repeat that, please?

Q. Has Enlow and Sons paid to Higgerson Brothers any of the sums due to Higgerson Brothers under the contract of July 1, 1955?

A. No, sir.

Q. Who paid to Portsmouth Paving Company and to Carter and Correll the charges for completing the contract?

A. Higgerson Brothers.

Dep. 5-30-57 page 19

Q. The contract of July 1st which was the contract between Enlow and Sons and Higgerson Brothers, who drew that contract?

A. Mr. Kesser.

Q. In that conference, did you have an attorney representing you?

A. I did not, sir.

Q. Were there any other attorneys present?

A. Mr. Kesser.

Q. Other than Mr. Kesser any other attorney present?

A. No, sir.

Mr. Kellam: You gentlemen may inquire.

CROSS EXAMINATION.

Examined by Mr. Fine:

Q. Mr. Higgerson, you entered into a contract with the T. E. Ritter Corporation, did you not?

A. That's right, sir.

Q. What particular work were you going to do with the T. E. Ritter Corporation?

A. Install the thirty inch pipe, forty-two inch pipe, and the catch basins related to that type pipe.

Q. Anything else?

A. That's all.

Q. And you saw fit to bid on that job yourself?

A. Yes, sir.

Q. I hand you this Project No. AU-1191 and ask you if that isn't the job that Ritter had with the State Highway Commission which you were to do that work?

Harold Higgerson.

Dep.
5-30-58 Mr. Kellam: Contract between T. E. Ritter Cor-
page 20 } poration and Higgerson Brothers is dated July 27, 1955 and has been introduced in evidence. Insofar as that contract may coincide with the proposal contract and bond between the State Highway Department and the T. E. Ritter Corporation, of course, it speaks for itself. Whether Mr. Higgerson is familiar with the provisions of this contract is of no concern in this case.

He entered into a contract to do certain work which is called for by his contract with Ritter and then Enlow agreed to perform all the provisions of the contract between Ritter and Higgerson Brothers. Any conflict between the two, of course, the Ritter contract would take precedence. Whether he has ever seen or is familiar with this contract, I don't know.

A. That is the job number.

Mr. Fine:

Q. And the work which you were to perform on this job with the T. E. Ritter Company is based on these plans and specifications?

A. That's right.

Mr. Fine: I would like to introduce that, may it please the Court. "Enlow Exhibit No. 1."

Mr. Garrett: Mr. Commissioner, we have taken a moment here to examine this exhibit which consists of many pages and while we didn't agree that it is admissible, we want first to be assured of its accuracy. It appears not to be certified in any fashion at all and, of course, we don't have
Dep. the opportunity here in this hearing to go through
5-30-57 this to determine whether it is what it purports to
page 21 } be.

Of course, it will be admitted subject to our objection as to its materiality in the first instance and second, subject to our right to make a subsequent examination to see if it is entirely what it purports to be since it is not certified in any way and there is no opportunity for complete examination.

Mr. Fine: I can represent to the Commissioner by virtue of a letter from the State Highway Commission that that is the contract, and I will introduce that. I will introduce this letter after it has been examined.

Harold Higgerson.

Mr. Kellam: The introduction of the letter doesn't go higher than the contract itself.

Mr. Garrett: Object to it.

Mr. Fine: I would like to introduce that, may it please the Court. Letter from the State Highway Commission.

The Commissioner: "1-A."

Mr. Fine: The witness has already answered.

Mr. Kellam: I object to the statement of counsel. If he has answered let the record state for itself. Doesn't need Mr. Fine's answer.

Mr. Fine: My answer is in answer to the objection made by counsel James N. Garrett.

Mr. Garrett: You realize you gave us a thirty or forty-five page document. We assume what it purports to be. We don't know that, but in order to save time, we reserve the right to examine it.

Mr. Fine: That is your privilege.

Dep.
5-30-57 page 22 } Q. In connection with your purported contract between you and Enlow and Sons, at your convenience, when we recess, I will get you to mark the pages on this to check with the contract. I will not take the time to do it at this moment.

Q. Was this sub-contract that you made with the T. E. Ritter Company, was that approved by the State Highway Commission, or do you know?

A. I do not know.

Q. You furnished an indemnification bond to the State Highway Commission or the T. E. Ritter Company?

A. To Ritter.

Q. In your contract with T. E. Ritter, did you state in your contract that you were going to sub-let the work or that you were going to do the work?

A. I did not state.

Q. You didn't say one way or the other?

A. No.

Q. When you sub-let this work to Enlow and Son, did you have the approval of the E. T. Ritter Corporation or not?

A. I told him I was going to let them have it and he said he didn't care just as long as he got it done.

Q. Do you have that in writing?

A. No, sir, I do not.

Harold Higgerson.

Dep. 5-30-57 page 23

Q. Had the T. E. Ritter Corporation inspected the work that was done by Enlow and Sons?

A. They were on the job.

Q. I didn't ask you that. Did they inspect the work?

A. I don't know whether they inspected it or if the State had inspectors to inspect the work.

Q. Did you tell T. E. Ritter Corporation that Enlow and Sons was not registered with the State of Virginia as building contractors?

A. I did not.

Q. Why?

A. Because they assured me they were going to get the registration papers.

Q. Then you knew that they were not registered? You knew they were not registered at the time you entered into this contract?

A. They said they had applied.

Q. You knew it at the time and date of entering into this contract that he had not registered with the State of Virginia?

A. They said they were going to get them.

Q. You knew, didn't you, that they didn't have it? They told you they didn't have it?

A. Yes.

Q. Did you ever inquire at a subsequent date as to whether or not they had obtained that registration certificate?

A. I did not.

Q. You didn't?

A. Mr. Kesser assured me they were going to get them.

Dep. 5-30-57 page 24

Q. Did you know that it was turned down?

A. No, sir, I did not.

Q. Then you didn't make any subsequent inquiry at all?

A. I did not.

Q. When you tried to enter into this agreement, your first conversation was with Mr. Enlow of Enlow and Sons?

A. Yes, sir.

Q. You did not talk first with Mr. Emanuelson or Mr. Kesser?

A. I did not.

Q. Mr. Enlow told you to meet him in Mr. Kesser's office?

A. That's right.

Harold Higgerson.

Q. And at that time, Mr. Emanuelson and Mr. Kesser and Mr. Enlow were present?

A. Yes, sir.

Q. Within a half-hour or so you all entered into an agreement?

A. I don't know the time.

Q. How long was it?

A. I said I didn't know.

Q. Would you say it was an hour or two approximately?

A. It might have been one hour or two hours.

Q. Anywhere from thirty minutes to two hours is a fair estimate, is that correct?

A. I think that's fair.

Q. Did you get any financial statement on Mr. Emanuelson or Mr. Kesser?

A. No, I did not, sir.

Dep. 5-30-57 page 25

Q. And you never knew anything about either one of their affairs?

A. No, sir.

Q. Did it occur to you that if someone was asking for suretyship that they would look into the matter of responsibility of the sureties?

A. I don't quite understand your question.

Q. If you were going to ask somebody or loan somebody some money, you would want to know something about them, wouldn't you?

A. Yes, sir.

Q. You didn't know anything about Mr. Kesser or Mr. Emanuelson, did you?

A. No, sir; not personally. All I knew is what I heard.

Q. And the only thing you ever heard was what Mr. Enlow told you?

A. I had heard some *might* good remarks about Mr. Emanuelson.

Q. And you knew nothing about Mr. Kesser?

A. No, sir.

Q. When you went over there, you told them that you had a job that you knew you could make a lot of money on?

A. No. I didn't tell them I would make a lot of money.

Q. What did you tell them?

Mr. Kellam: Tell them about what?

Mr. Fine: He understands. He is getting ready to answer the question.

Mr. Kellam: I want to know the nature of the question.

Harold Higgerson.

Dep. 5-30-57 page 26

Mr. Fine: He is getting ready to answer. He understands it.

Mr. Kellam: Maybe it's not the question you asked.

Mr. Fine: If it is not responsive, I will ask the Commissioner to strike it out.

A. Repeat the question.

Mr. Fine:

Q. What did you tell them about the value of the contract that you had with T. E. Ritter?

A. I didn't tell them.

Q. You mean to tell the Court that you didn't tell them there was some money to be made in the contract?

A. Naturally, when we bid a job, we expect to make money.

Q. Didn't you tell them there was not less than $12,000 profit in the job?

A. No.

Q. How much did you tell them?

A. Didn't set no figure. I said there would be some money made.

Q. When you made your estimate for your bid, how much did you expect to make on the job?

• • • • •

Dep. 5-30-57 page 27

• • • • •

A. We try to figure 10% profit, but we don't know what we are going to make. You have got so many unforeseen things.

Mr. Fine:

Q. You figure 10%?

A. Yes, sir.

Q. How much gross?

A. How much gross?

Q. Yes, sir.

A. We have different figures for figuring our overhead and profit.

Q. I understand that. I am asking how much gross.

Harold Higgerson.

Mr. Garrett: You may know what you are talking about Mr. Fine. I don't know. Gross amount of the contract, gross amount of the profit, or what?

Mr. Fine: Gross amount of the profit.

Dep.
5-30-57 A. Well, figuring it, you figure a percentage and
page 28 } then plus the rental of your equipment on the job.

Q. How much is that?

A. I set mine up different from other folks.

Q. Answer the question.

A. I have not got the figures with me.

Q. Do you have how you estimated the job?

A. Yes, sir.

Q. Let me see it, please.

A. I haven't got it with me.

Q. Do you know how much the job was to amount to?

A. Approximately $80,000, I believe at the time.

Q. Give us the figures.

A. It is based on unit prices. In a highway contract, you don't know the exact amount of units that you are going to do.

Q. How much was it per unit?

Mr. Kellam: The contract speaks for itself. You refer to the contract, Mr. Higgerson, if you wish to do so and tell him how much it is a unit, if that is what he wishes to know.

A. (Witness looks at contract.) The largest items on here are thirty, thirty-six and forty-two inch pipe.

Mr. Fine:

Q. I didn't ask you that. I asked you how much per unit?

A. $985 for one unit and $1,365 for another unit and $1,785.

Q. Then if you were going to make 10% gross on
Dep. the job and it was approximately $80,000 involved,
5-30-57 then all of the profit in it would have $8,000; is
page 29 } that correct?

A. Yes, sir.

Q. Why did you represent to them that you were going to make $12,000?

A. I didn't represent to them I was going to make $12,-000.

Q. I ask you to refer to this agreement to be divided equally

Harold Higgerson.

over and above the $6,000 noted herein. Look at that item No. 4.

A. (Witness looks at paper.) Item No. 4 or 3?

Q. 3.

A. We were to receive $6,000. Didn't say $12,000.

Q. You were supposed to get half, weren't you, not to exceed $6,000?

A. No, sir.

Q. In other words, you were going to get $6,000 out of it and they were to get *on* $2,000? Did you tell them that?

A. No, I didn't tell them that.

Q. You didn't tell them it was a pig in the bag?

A. No. They had plans and specifications. They bid on it like I did.

Q. Did you have anybody else bid on this thing except Enlow and Sons?

A. I had one other price.

Q. Who was that?

A. Jake Rabet.

Q. What was his price?

A. He decided it was too big for him.

Dep. 5-30-57 page 30

Q. So you didn't get a price from anybody else?

A. He told me what he could do it for.

Q. But he decided he couldn't do it?

A Yes.

Q. You came over and told Mr. Enlow this was a money-making job?

A. No, sir.

Q. You didn't tell them that you could take a licking on the job, did you?

A. What?

Q. Did you tell them you could lose money on the job?

A. No, I didn't tell them.

Q. You just testified it all depends on the conditions and circumstances how much you are going to make?

A. That's right. Don't know what conditions will be when you bid.

Q. When you bid the job, you don't know what the conditions are going to be. Anything in the contract about anybody losing any money?

Mr. Kellam: Object to that. Contract speaks for itself.

Mr. Fine:

Q. Answer the question.

Harold Higgerson.

Mr. Garrett: Read it, Mr. Higgerson. Don't express an opinion.

Mr. Kellam: Read the whole contract to him if he wants you to. Start at the beginning.

Mr. Fine: Wait a minute. Object to this counsel telling the witness how to answer. He has a perfect right to read the contract and then answer the question. My friends don't have any right to tell him to read the contract and read it out loud and put it in the record. I am not asking him to read the contract. I am asking him to examine the contract and I ask him if the contract provides any loss there.

Dep. 5-30-57 page 31

Mr. Garrett: Of course, the question is ridiculous because the agreement between the parties is reduced to writing and the opinion of the witness as to whether or not it contemplates or provides for a loss is not material. The language of the written contract is there and my friend has heretofore objected to prior conversation and now he is asking the witness to give a legal opinion on the contract which is one of the matters before Your Honor and the contract speaks for itself and we say the only way he can answer that is to read the contract to him?

The Commissioner: Counsel for both sides seem to have the same objection on that but it is my duty to record the testimony. Answer the question.

Mr. Fine:

Q. Did the contract provide for anything about losses?

A. I was to receive $3,000. That was regardless of what happened.

Q. Didn't you tell them that they were going to make $12,000 or more on it?

A. I did not.

Q. Don't you even have in here you would get as much as $6,000.

A. Yes.

Q. So you weren't going to get $3,000 for it?

A. I was going to get $3,000 if it didn't make over $6,000.

Mr. Garrett: That is in the contract.

Dep. 5-30-57 page 32

By Mr. Fine:

Q. That's right, isn't it?

A. I was to get $3,000 regardless of what happened.

Harold Higgerson.

Q. You certainly told them this was a contract where they would make not less than $6,000, didn't you?
A. I didn't tell them.
Q. You didn't tell them?
A. No, sir.
Q. Didn't you tell them you were going to make or that they were going to make money on the job?
A. I did not.

Mr. Garrett: That is the ninth time he asked that question. I suggest some reasonable limitation should be put on it.

Mr. Fine:
Q. In connection with the exception of this contract, did you already post your bond with the Ritter Company before you entered into this agreement?
A. I did, sir.
Q. How much bond did you put up?
A. Full amount. 50% payment and 50% performance.
Q. You did not assign your contract from T. E. Ritter to Enlow and Sons, did you?

Mr. Kellam: Object to that. It is a conclusion. That is a legal problem for the Court to decide whether it is an assignment or what it was.

Dep. 5-30-57 page 33 } Mr. Fine:
Q. When you made your contract with Enlow and Sons, Ritter Corporation notify the State Highway Commission, did you?
A. I didn't; no, sir, I did not.
Q. But the State Highway Commission knew that you were one of the sub-contractors for T. E. Ritter Corporation, didn't they?
A. I don't know, sir.
Q. Did the State Highway Commission have anything to do with the contract entered into between you and Enlow and Sons?

Mr. Kellam: The State Highway Commission is the only one that can answer that question.
Mr. Fine: Let the record show, please, that counsel is answering questions as counsel for one of the defendants on cross examination, which is not proper and it is highly improper.

Harold Higgerson.

My friend has a right to object in accordance with his wishes and in accordance with his experience but he has not the right to answer questions on cross examination.

Mr. Kellam: I stated that as an objection.

Mr. Fine: You didn't state it as an objection.

Mr. Garrett: We object to the question on the ground that what the State Highway Department knew is a matter that this witness can't possibly answer. He is not the State Highway Commissioner and he is not connected with them. It is irrelevant what they knew. We are dealing with contractural relationship between the parties to this suit. It would certainly call for an opinion as to whether he knew they knew something and secondly, it is irrelevant because they are not a party to these proceedings.

Dep. 5-30-57 page 34

The Commissioner: Gentlemen, we have gone into the objections. Let's go ahead.

Mr. Fine:

Q. Did you notify the State Highway Commission personally about your entering into an agreement with Enlow and Sons?

A. No, sir, I did not; not my responsibility.

Q. Did you notify the surety company?

A. No, I did not.

Q. Did you notify T. E. Ritter?

A. Yes, sir.

Q. They accepted Enlow and Sons and discharged you?

A. No, they did not discharge me.

Q. They were holding you responsible for the job?

A. Yes, sir.

Q. So, therefore, so far as T. E. Ritter Corporation was concerned, it was looking to you for the performance of the job?

A. That's right.

Q. No question about that? Then the T. E. Ritter Corporation never did look to Enlow and Sons for the completion of this job?

A. They did not look to Enlow. Didn't look to Higgerson Brothers. They looked to T. E. Ritter Corporation.

Q. When you entered into an agreement with Enlow and Sons, did you notify your surety company that went on your bond?

Mr. Kellam: He just answered the question before.

Harold Higgerson.

A. I told you "No."

Dep.
5-30-57
page 35 } Mr. Fine:
Q. You did not?
A. At the time I didn't notify them. He knew it afterwards.
Q. Did you notify your surety company that you had a contract with Enlow and Sons at any time?
A. Yes.
Q. When?
A. It was probably a month or so afterwards.
Q. Did you do it in writing?
A. No, sir.
Q. Who did you notify?
A. Mr. Page.
Q. When you notified Mr. Page, did you notify him that you had anybody guaranteeing the job to you?
A. I told him that I had Mr. Emanuelson and Mr. Kesser's surety on the contract.
Q. You told him that?
A. Yes, sir.
Q. When you told Mr. Page that, did he release you from your bond?
A. No, sir.
Q. Did you assign this to the bonding company?
Q. You mean sign this contract? No, sir.
Q. You did not. And they didn't release you from your bond, did they?
Dep.
5-30-57
A. No, sir.
page 36 } Q. Referring to this contract, you exercised some control over the job, didn't you?

Mr. Kellam: We object to it. The contract speaks for itself.

A. I didn't have no control over the job. Mr. Enlow was responsible for it.

Mr. Fine:
Q. Did you draw checks on the job?
A. It was his signature. Mine.
Q. Both of you?
A. Yes, sir.

Harold Higgerson.

Q. And the money was deposited in the bank?
A. Yes, sir.
Q. And every time you had to meet a payroll, both of you signed checks?
A. Yes, sir.
Q. Who put the money up?
A. We did.
Q. How much did you put up?
A. I don't know. The record will speak for itself.

Mr. Kellam: Let the record show when he says "We did," who he refers to.

A. Higgerson Brothers.

Mr. Fine:

Dep. 5-30-57 page 37

Q. You don't know how much you put in the bank originally when you opened the account?
A. No, I don't recall.
Q. Did you furnish the material for the job?
A. Yes, sir.
Q. Did you have enough money to pay your payroll?
A. We did for the early part of the job.
Q. When did you stop paying the payroll?
A. I don't know as we ever stopped. There were a couple of times I asked them to make the payroll because I didn't have the money to make it and being as the payroll was charged to them, I figured they should make it.
Q. But your contract provided that you should make the payroll, is that right?
A. When funds were available.
Q. Is there anything in the contract saying "when funds are available"? I hand you the exhibit.

Mr. Kellam: In Paragraph 4, Mr. Higgerson.
Mr. Fine: Object to counsel assisting the witness.
The Commissioner: Objection noted.

A. It says, "When funds are available we can make payrolls, pay for materials and other expenses."

Mr. Fine:
Q. Show that to me.
A. (Witness points to place on page.)

Harold Higgerson.

Mr. Garrett: Fourth line from the bottom of Paragraph 4.

Dep. 5-30-57 page 38 } Mr. Fine:

Q. "That withdrawals shall be made for materials, payrolls, and other expenses when funds are available and withdrawals shall be made by the signature of Harold Higgerson and H. A. Enlow" You were to furnish the payroll?

Mr. Kellam: Object. Contract speaks for itself.

Mr. Fine:

Q. "Higgerson Brothers agrees to purchase all material for the job, make the payroll as it becomes due furnish the bonds, insurance indemnity requested in the above project and it was to be charged to *be* account of Higgerson and Enlow."

A. Yes, at the start of the job, and as the money came in, it was deposited to Enlow and Higgerson.

Q. Was all the money deposited there?

A. Until the last two estimates—

Q. I mean when you were all working?

A. Yes. As long as they worked, it was deposited.

Q. And you failed to furnish the necessary payroll on several items?

A. Not on several items. It might have been a couple of items.

Q. With regard to Item 4 that you just mentioned about when funds shall be available, that is when the account was opened up, is that correct?

A. Yes.

Q. Why did you stop furnishing money for the job as you were supposed to do?

Dep. 5-30-57 page 39 } A. I felt like I had put enough money into the job and all the payrolls was to be charged to them.

Q. That's all you were going to put in the job?

A. Yes, sir. I felt like it was their obligation to make them.

Q. Then you failed to put any more money in the job and then did they stop working on the job?

A. No, they didn't stop working. They made the payroll and we gave them a check back out of the fund when we got the estimate back in.

Q. Did they help to furnish the payroll?

Harold Higgerson.

A. They helped furnish the payroll but they were reimbursed out of the fund of Enlow and Higgerson.

Q. How many times did they help you?

A. I don't *knpw;* a couple of times.

Q. You told them you didn't have the money?

A. I told them I didn't have the money.

Q. You didn't tell them you felt you weren't going to put any more money in the job?

A. I told them I didn't have the money. I wished they would make the payroll.

Q. The truth is you felt like you weren't going to put anymore money in it, as you just testified?

A. Yes, sir.

Q. Did you put any more money in it after that, after you felt that way?

A. Yes, sir. I put considerable amounts in it to finish the job.

Dep. 5-30-57 page 40 } Q. I didn't ask you that. I am talking about after you felt like you didn't want to put any more more money in the job, you didn't put any more money in the job, did you?

Mr. Kellam: He just answered you.

Mr. Fine: He answered me, Mr. Kellam, but he answered me he put money in to complete the job after Enlow and Sons was out of the job.

Mr. Kellam: You asked him if—

Mr. Fine:

Q. Did you put any more money on the job when Enlow and Sons were there after you felt you weren't going to put more?

A. Yes, sir.

Q. How many times?

A. I don't know.

Q. What amount?

A. I don't know, sir. The records will speak for themselves.

Q. When did you stop putting money in there for the payroll? What date?

A. I don't know.

Q. What did you tell Enlow and Sons about it then?

A. I asked them to make the payroll because I didn't have it.

Q. Didn't they refuse to do it?

A. No. They made it.

Harold Higgerson.

Q. I am speaking about before the job was stopped so far as Enlow and Sons were concerned. Did you put any more money up immediately before then and tell them that you would make the payroll?

Dep. 5-30-57 page 41

A. Would you repeat that?

Q. Let me break it down. Do you know the date Enlow and Sons stopped work on the job?

A. No, I haven't got it. We have got the last payroll.

Q. You don't know the date? How many weeks before they stopped work on the job was it that you had refused to put any more money in there for payroll?

A. Two or three weeks. I don't recall.

Q. How would the men get paid if you weren't going to put the money in the payroll?

A. They made the payroll. I asked them to make it.

Q. Did they pay it?

A. Yes.

Q. Didn't they tell you then that they could not and they were not financially able to make the payroll and they couldn't go through with the job unless you made the payroll?

A. No.

Q. I expect to contradict you, sir. Do you want to change your answer?

A. Would you repeat that, please?

Mr. Fine: Please read the question back.

The Reporter: "Didn't they tell you then that they could not and they were not financially able to make the payroll and they couldn't go through with the job unless you made the payroll?"

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A. No, they never told me that.

Q. What did they tell you?

A. They said they had other work to do.

Q. Don't you know that the whole crux of this matter, sir, was the fact that you did not make the payroll and you felt and told them that you felt that you weren't going to pay another dime on this job?

A. I didn't tell them I wasn't going to pay another dime.

Q. You didn't tell them that?

A. No.

Q. What did you tell them?

A. I told them they would have to make this payroll because I didn't have the money.

Q. I refer to your letter of September 11, 1955. Didn't

you tell them that you had invested all the money that you thought was proper?

Mr. Kellam: I request that the letter be shown to him and let him see the letter.
Mr. Campbell: It's an exhibit.
Mr. Kellam: But I request the letter be shown to him.

Mr. Fine:
Q. Do you remember writing this and saying in your letter of September 11, 1955, the following: "Through September 10, 1955, we have invested, $14,741.43 in this co-adventure." Do you remember that?
A. I don't recall.
Q. Let me show it to you, sir. (Witness looks at letter.) "Through September 10, 1955, we have invested $14,741.43 in this co-adventure and feel this amount of money should have been sufficient to finish the job under any circumstances." Did you write that?
Dep. 5-30-57 page 43 } A. My bookkeeper wrote that. I told him to write them and tell them how much money we had spent, how much we had expended.
Q. Who expended it?
A. I did.
Q. Then you wrote it? It was with you approval and consent and instructions, wasn't it, and your signature?
A. (Witness doesn't answer.)
Q. Answer that, please, sir.
A. Yes, I signed it.
Q. Didn't you write this further in the letter: "We now feel that for weeks when the payroll for that week exceeds the amount of work completed during the respective week after allowance for cost of materials that we should not be obligated to furnish such payroll." Did you write that?
A. Yes, sir.
Q. So you do want to change your answer now from when I asked you awhile ago about the payroll that you weren't going to pay any more?

Mr. Kellam: Object. Suggests an answer.
Mr. Fine: Cross examination.

Q. Your prior statement was incorrect?
A. I told you before that we felt they were obligated to do it. They had to make the payrolls. It was charged to them.

Harold Higgerson.

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Q. I am interested in the contract. Up to that time, you did make all the payrolls, didn't you?
A. Yes, sir.
Q. And then you said you didn't want to make any more payrolls, is that right?

Mr. Kellam: Object to that. The letter doesn't say he didn't want to make any more payrolls.
Mr. Fine: The letter speaks for itself and says, "We should not be obligated to furnish such payrolls."
Mr. Kellam: That's correct.
Mr. Fine: I point it out to you, Mr. Commissioner, as one of the important factors in the case that "We should not be able to obligated to furnish such payrolls."
Mr. Kellam: That is correct.

Mr. Fine:
Q. Did you furnish any more payrolls after that?
A. Yes, sir.
Q. How many?
A. I don't know, sir.
Q. How many did you get Enlow and Sons to furnish?
A. I don't know. Wasn't many. They drew the money out of the joint account.
Q. You say they didn't furnish them?
A. That's right.
Q. Didn't they tell you they couldn't furnish the payroll and they were looking to you for this contract and if you couldn't finish the payroll, they couldn't go through with the job?

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A. No, I didn't tell them that.
Q. Do you want to change your answer?

Mr. Garrett: Mr. Commissioner, I submit Mr. Fine's method of stating he is going to contradict him is not proper. I think he can lay the foundation for contradiction but I submit that the form he is addressing the witness is not in conformance with established practice. Object.
Mr. Fine: We respectfully submit under the Queen's rules, we have to lay a foundation for the contradiction of this witness, and it is well settled that counsel has to tell the witness he expects to contradict him.
Mr. Garrett: You have to state to whom he supposedly made the statement and approximately when or where the statement was made before you lay the foundation and you haven't done it.

Harold Higgerson.

Mr. Fine: All we have to do is ask him whether he made a contrary statement and he can reply when or where.

The Commissioner: Gentlemen, you know the Commissioner's position. I hope you will all go by the rules that you know.

Mr. Fine:

Q. Mr. Higgerson, on July 2, 1956, you wrote this letter which was delivered, which letter was delivered on July 5, 1956, that you would have to get somebody to complete the work if you didn't hear on July 6th; is that right?

A. Yes, sir.

Q. When you wrote that letter, did you write that letter by advice of counsel?

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A. No, sir.

Q. You did that and made the date arbitrarily yourself, is that correct?

A. Yes, sir.

Q. Did you notify Mr. Emanuelson or Mr. Kesser personally about their responsibility, alleged responsibility or surety?

A. I think we sent them a copy of the letter.

Q. See if you did; any one of them individually.

A. (Witness looks at letter.) No.

Q. You did not?

A. No.

Q. I ask you, sir, if in this letter that you wrote on July 2, 1956 that you ever declared any responsibility or liability there on Mr. Kesser as a surety or Mr. Emanuelson. Look at it.

A. (Witness looks at letter.)

Mr. Kellam: Object to the question on the ground that the letter speaks for itself.

Mr. Fine: I want the record to show this is cross examination, sir.

A. These receipts—

Mr. Fine:

Q. Just answer my question, please.

Mr. Fine: Please read the question.

The Reporter: "Q. I ask you, sir, if in this letter that you wrote on July 2, 1956 that you ever declared any responsibility

or liability there on Mr. Kesser as a surety or Mr. Emanuelson. Look at it."

Dep.
5-30-57
page 47 } A. It don't show it here.
Q. Have you got any letter at all between the time of the date of this contract which is July 1, 1955 to the date of this letter of July 2, 1956 wherein you asked for Mr. Kesser or Mr. Emanuelson to indemnify you?
A. I think we got a letter where we wrote them and told them in regard to some part of the work; but I don't recall what it was.
Q. Have you got the date of the letter?

Mr. Kellam: It is in evidence, Mr. Fine, as an exhibit.
Mr. Fine: I beg your pardon and want to contradict you on it because there is no claim.
Mr. Kellam: September 11, 1955.

Mr. Fine:
Q. This is only in connection with the agreement as to the payroll I am asking you about any letter that was ever written to Mr. Kesser or Mr. Emanuelson in connection with their alleged liability in this case. Have you got any such letter?
A. I don't believe so.
Q. I refer you again to your letter of September 11, 1955 in which you called this a "co-adventure." What do you mean by that?
A. I don't know. That is a new word.
Q. You used it, didn't you?
A. Well, I didn't question the word after he wrote it. I just signed it.
Q. Now, referring again to this contract, I ask you to look at it and see if there is anything in here in connection with the use of machinery on the job.

Dep.
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page 48 } Mr. Kellam: We object to the question on the ground that the contract speaks for itself.

A. No. They were to perform all work.

Mr. Fine:
Q. I ask you to be responsive to my question. I ask you

if there was anything in this contract about machinery or equipment. You can answer that, please, sir.

Mr. Garrett: That is not a fair question, Mr. Commissioner, because exclusion, what is excluded. He is asking whether the word "machinery" is mentioned in there. That is one thing, but whether the legal import of that contract requires them to furnish machinery is set forth in the contract and his opinion is not material.

A. Nothing in here about equipment.

Mr. Fine:

Q. Isn't it true that you were to pay for everything?

A. Just materials and labor.

Q. Didn't you know that Enlow and Sons was a new corporation, as they had told you?

A. Yes, sir.

Q. Did you know they didn't have any machinery equipment?

A. No, sir. There are plenty of equipment dealers. You can get equipment any place you want to.

Q. Who was going to pay for it?

Dep. 5-30-57 page 49 } A. They were. They were going to perform the work.

Q. That wasn't in the contract, was it?

A. They were to perform the work either with shovel or equipment.

Q. You paid all the bills for the equipment, did you not?

A. No.

Q. How much did you estimate the equipment rental would be, in your bid?

A. I don't recall.

Q. You will have that later, won't you?

A. (Witness doesn't answer.)

Q. I refer you to Paragraph 4 which says therein: "shall be made from material, payrolls, or other expenses." What were the other expenses?

A. Incidental. Cement.

Q. Cement is material, isn't it?

A. Yes, sir.

Q. Did you ever pay rentals on the equipment?

A. I think there were some bills that were submitted and paid.

Q. You paid them with your signature on the check?

Harold Higgerson.

A. That's right.
Q. You had some insurance on this job, didn't you.
A. Yes, sir.
Q. All right, sir.

(Five minutes recess.)

Mr. Fine:

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Q. I hand you memorandum of July 6, 1955, Pennsylvania Threshermen & Farmers Mutual Casualty Company. It is to Mr. C. Edgar Winn of the Mutual Insurance Agency.

That is the insurance company on the job?

A. Yes, sir.
Q. Did you have any other insurance on the job?
A. Sir, we furnished what insurance they required. I don't know.
Q. You mean to tell us you don't know of any other insurance other than this memorandum of July 6, 1955?
A. If that is all you have got, that is all that was required.

Mr. Fine: I would like to introduce this, Your Honor.
The Commissioner: Received as "Enlow Exhibit 2."

Mr. Fine:
Q. As I understand it, all the insurance that you had on this big job was set forth in this memorandum of July 6, 1955 in which you only had $10,000 of property damage, a total of $60,000 and also liability insurance as set forth in there, is that right?
A. That is what they required.
Q. Did you expect Enlow and Sons to give you a bond?
A. I wanted some kind of surety.
Q. For what?
A. For the performance of the work.
Q. So far as this contract is concerned, you had nothing in here in connection with a performance surety, did you?

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Mr. Kellam: Object to it on the ground that the contract speaks for itself and what his interpretation of it may be or the language which was used may be different from your idea of it. That is a matter for the Commissioner. The Court and the Commissioner will determine that.

Harold Higgerson.

Mr. Fine:
Q. You had workmen's compensation, didn't you?
A. Yes, sir.
Q. And the workmen's compensation insurance was all you had, wasn't it?
A. No, sir.
Q. Workmen's compensation and property damage?
A. Comprehensive liability.
Q. Did that cover workmen's compensation?
A. That covered everything.
Q. You had no other insurance necessary on the job? Was other insurance necessary?
A. I gave what insurance they required. If it hadn't been all right with them, I would have heard from them. That is all I ever furnished the state or any other one that I worked for. I called up my agent and sent the certificate of insurance.
Q. I take it from this then the State never knew at any time so far as insurance was concerned that Enlow and Sons was doing this job?

Mr. Kellam: That is a conclusion of counsel; not a question for the witness to answer. He stated that he takes it that the State never knew that Enlow and Sons was doing the work for Higgerson. That may be his conclusion.

Dep.
5-30-57 Mr. Fine:
page 52 } Q. Answer my question, please.

Mr. Kellam: That's not a question.

Mr. Fine:
Q. Answer my question. Read the question, please.

The Reporter: "Q. I take it from this then the State never knew at any time so far as insurance was concerned that Enlow and Sons were doing this job?"

A. We weren't doing it for the State.
Q. Just a moment ago didn't you say that you gave notice to Mr. Ritter and the State in connection with what insurance they required?
A. Not the State. Just Mr. Ritter.
Q. Let's talk about Mr. Ritter. Mr. Ritter never did have

any insurance on this job so far as Enlow and Sons was concerned?

A. I don't suppose he did.

Q. Don't you know he didn't have any? No speculation.

A. I furnished the insurance.

Q. Then, as a matter of fact, Enlow and Sons never had any insurance on this job?

A. No. I carried the insurance and it was to be charged to them.

Q. It would not be any good if it didn't cover Enlow, would it?

A. That covered everybody. It was protecting everybody.

Q. Look at that memorandum and see if it covered everybody.

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Mr. Garrett: That is a legal conclusion. The policy of insurance would be the best evidence, not the opinion of the witness.

Mr. Fine: I would like to point out to Your Honor that this insurance is only for Higgerson Brothers.

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Q. Do you know of any other insurance policy other than this on this particular job?

Mr. Garrett: That is not an insurance policy.

Mr. Fine: I call it an insurance policy.

Q. Do you know of any other on this job?

A. I don't know of any right now. There may be some more.

Q. Did you make a memorandum and attached that to this and give that to us? Look at that, please, sir.

A. (Witness looks at paper.)

Mr. Fine: We have asked this gentleman to produce any insurance policies that he has on the job other than this certi-

cate that has been marked by the Commissioner as an exhibit.

The Commissioner: You mean all the insurance represented by this certificate?

Mr. Fine: Yes, sir.

Mr. Kellam: We submit to you, Mr. Fine, Pennsylvania Thresherman's and Farmer's Mutual Casualty Insurance Company Policy No. WC365892.

Mr. Fine: That is exactly what this is.

Mr. Garrett: But that is a memo from Mr. Fine and not a policy.

Mr. Fine: That is a certificate of the very same policy.

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Mr. Garrett: It does not contain the provisions of the policy, Mr. Fine.

Mr. Kellam: I submit it to you, sir. I also submit to counsel Pennsylvania Thresherman's and Farmer's Mutual Casualty Company Policy No. CGL6015 with numerous endorsements and we introduce in evidence and ask to be marked as exhibits, these two policies with the right to withdraw them and execute copies when certified by the agent.

The Commissioner: Any objection to the policy being introduced at this time?

Mr. Fine: No. We asked for them, as a matter of fact.

The Commissioner: Received and marked as "P-5 and P-6."

Mr. Kellam: I request leave to withdraw them and furnish certificates in their place. We hand you Policy No. WC387354 for the same insurance company. Introduce that in evidence with the same right.

The Commissioner: All Pennsylvania Threshermen's and Farmer's?

A. Yes, sir.

Mr. Kellam: Yes. I ask that the Commissioner mark them all.

Mr. Fine: We have asked for them. We want to object, may it please the Court, to the introduction of this policy of February 1, 1955, on the ground that it is not pertaining to this job. It is solely and only a liability policy in connection with vehicles Other than on this job, they even have their own personal automobiles involved here. Chevrolet, Mercury, and a number of other personal cars belonging to the Higger-

Harold Higgerson.

son Brothers; having nothing to do whatever with this job.

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The Commissioner: All right.

The Commissioner: Pennsylvania Threshmen's and Farmer's Mutual Casualty Company Insurance Policy No. 365792 covering period February 15, 1955 to February 10, 1956 received and marked "P-5." Policy No. CGL6015, covering period February 15, 1955 to February 10, 1956, received and marked "Plaintiff's Exhibit No. 6."

Policy No. WC387354 covers period February 15, 1956 through or rather, to February 15, 1957. Received and marked "Plaintiff's Exhibit No. 7."

Mr. Fine:

Q. Going back to my question, I ask you if you didn't prepare this memo or had prepared this memo and furnished this certificate of policy? I don't know whether you answered it or not.

A. Yes. We submitted them to you.

Q. You did not submit any other insurance policies, did you, or certificates of insurance?

A. I don't know. I called my insurance man and had him to mail them.

Q. Aren't you very much mistaken? This thing is dated February 15, 1955 for coverage and your contract was entered into July 1, 1955?

A. Repeat that, please.

Mr. Kellam: I don't understand the question.

Mr. Fine: Let the Commissioner and the Court appreciate the fact that Counsel for the Complainant continually interrupts without cause the proper cross examination of this witness and they have just a few moments ago placed in evidence some policies in answer to his question that he knew of no other policies. Now we have asked this witness if this policy which counsel has introduced which shows coverage of February 5, 1955 is outside of the contract here which was dated July 1, 1955.

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Mr. Fine:

Q. Answer my question.

Harold Higgerson.

A. I don't know about the policies. I have told you I called my insurance man when I got a job and have him send the insurance certificate.

Q. Can you say Policy WC38972, Exhibit No. 4 for the Plaintiff, is in connection with that job?

A. I can't say. All my policies cover all jobs.

Q. I am asking you whether you can say that policy covers this particular job for which you gave to the T. E. Ritter Corporation in accordance with your estimate?

A. I suppose it does.

Q. Don't you know you were not required to give that in connection with T. E. Richter and there is no endorsement there for T. E. Ritter?

A. I don't know. All I do is call my *my* insurance man. He takes care of my insurance.

Q. I refer you to "Plaintiff's Exhibit No. 7" and ask you if this isn't in connection with some other job?

A. It could be any one of my jobs.

Q. Do you know whether it is connected with the job involving Enlow?

A. It is a job that he did for us.

Q. Did you charge Enlow and Sons for that premium?

A. I could not say.

Dep. 5-30-57 page 59 } Q. I am referring to "Exhibit No. 7." You don't know. Can you say *that* you charged with regard to "Exhibit No. 5"?

A. I said I didn't know. I told you my agent takes care of all that.

Q. You know nothing about that?

A. No, sir.

Q. I refer you to "Plaintiff's Exhibit No. 6" and ask you if it isn't a fact that this covered your personal automobile and was not involved in connection with this job?

Mr. Kellam: We say the policy speaks for itself. It is not his idea of what it covers. If the policy does not cover the job, then it is in answer to the question. If it doesn't cover the job, it is still in answer to the question and his interpretation of the policy would mean nothing. He may read something. He thinks he reads something in the policy that isn't there. He may omit to see something in the policy that is there.

Mr. Fine:

Q. Answer the question.

Harold Higgerson.

A. Like I said before. My insurance man takes care of my insurance. I don't know.

Q. Don't you know this policy was issued on February 15, 1955 before you even had this job awarded to you?

A. That is what the date says, "February."

Q. February 15, 1955. You didn't have this contract until July 1, 1955 with Enlow, is that right?

A. That's right.

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Q. I will refer you to Exhibits 5, 6, and 7, and ask you if on these policies anywhere Enlow and Sons is insured?

A. These policies cover all claims and liabilities for bodily damage.

Q. I asked you whether it covered Enlow and Sons?

Mr. Kellam: We say the policy speaks for itself and it is not a matter for him to decide. I call your attention to Endorsement No. 2 attached to Policy No. CGL6015, heading of which says, "Inclusion of contractural liability arising from all contracts."

Mr. Fine: Let me see that. But you have nothing in there in connection with Enlow and Sons protecting them.

Mr. Kellam: The policy speaks for itself.

Mr. Fine: Why do you insist on saying "including all contracts" when it doesn't include Enlow and Sons?

Mr. Kellam: It covers all.

Mr. Fine: Insurance is a personal item.

Mr. Kellam: It covers all contracts entered into.

Mr. Fine: I don't want to get into legal argument, but you have nothing in here regarding Enlow and Sons.

Mr. Garrett: That is a legal conclusion.

Mr. Fine:

Q. Mr. Higgerson, it was your duty, was it not, under this contract and I refer to Item 5, "Higgerson Brothers shall obtain all the insurance as noted in instructions dated June 27, 1955 from T. E. Ritter Corporation and these items are to be an expense of Enlow and Sons, Inc., and shall be to keep both of these parties hereto harmless for these items." What are the instructions dated June 27, 1955? Have you got those?

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A. In the contract of T. E. Ritter.

Q. As introduced in that green memo, Exhibit 1, is that right?

A. No, that is not. That is not it.

Harold Higgerson.

Q. Where is it?
A. It is at T. E. Ritter Corporation. Their instructions.
Q. Where are their instructions?
A. In their contract.
Q. All right. And that is as follows: "Your own workmen's compensation insurance, comprehensive general public liability, and property damage insurance. Automobile public liability and property damage insurance and all other forms of insurance needed for your and our protection. Said policies to have adequate limits of liability. It is understood you will furnish us prior to the commencement of our operations with certificates of insurance showing such coverages and providing that your insurance carrier will give us ten days prior written notice of any material change in or cancellation of the coverage." Is that correct?

Mr. Kellam: We object to the question of whether or not that is all that is covered by the contract. Contract speaks for itself.

Mr. Fine:
Q. Is that correct?
A. That is what is written there.
Q. That is all you gave T. E. Ritter Corporation, is that correct? The certificate?
A. I called my insurance man. I told him what I had to have and he took care of it. This is the only memo-
Dep. radum he gave. I don't know how many he gave. I
5-30-57 haven't seen it.
page 62 } Q. This is the only one that you gave us a copy of, is that correct?
A. I don't know. I didn't give it to you.
Q. Do you know where we got it from?
A. No.
Q. Don't you know we got it from counsel?
A. No, sir, I don't know where you got it.
Q. Have you got any other memo showing that ten days notice was to be given T. E. Ritter Corporation as indicated there?
A. No.
Q. Haven't got it in your files?
A. No, sir. Ten days notice for the policy?
Q. If it should be cancelled, Ritter would be notified within ten days?
A. It has not been cancelled.

Harold Higgerson.

Q. I asked you if you had another certificate like this for another kind of insurance for T. E. Ritter?

A. I might have. I don't know.

Q. You haven't got it today?

A. No, sir.

Q. But you will produce it if you do have it?

A. I will get what you need.

Q. Did you ever obtain any insurance of any kind for the benefit of Enlow and Sons, Inc.?

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A. My policy protects all my contracts.

Q. Does it protect Enlow and Sons, Inc.?

A. My policy protects all my contracts.

Q. Does it protect Enlow and Sons, do you know?

A. I don't know. I can't answer that.

Q. You wanted some insurance from Enlow and Sons to protect you in the event that they had any liability on this job in connection with any insurance they didn't have, didn't you?

A. I wasn't worried about the liability of the workmen and property damage. I was worried about the performance of the contract.

Q. Did you have anything in your agreement with them about the performance of the contract?

A. They were to perform all of it.

Q. Nothing in the contract that way, is it?

A. Yes.

Q. Read it.

A. They were to perform all work under that contract. I had the T. E Ritter Corporation—

Q. I am speaking of Emanuelson and Kesser. Did they ever stipulate they would save you harmless from claims of liabilities that were not covered by insurance noted to be contained in Paragraph 5?

A. That's what they signed.

Q. And you didn't get any insurance for Enlow and Sons and charged them with any insurance, did you?

A. We had the insurance.

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Q. I am talking about Enlow and Sons specifically now. Did you get any liability insurance for them?

A. Our liability covered that.

Q. You haven't answered my question. I am asking you if you got any insurance policy liability for Enlow and Sons?

A. No; didn't have to.

Q. You didn't get it?

Harold Higgerson.

A. No.

Q. All right. And you didn't get any insurance policy to cover Enlow and Sons if they did you any damage on the job for which you would be responsible, did you?

A. My insurance covered that.

Q. I appreciate what you say, but you just answer my question. I am asking you to be responsive. Did you ever get any insurance to cover Enlow and Sons in the event that you were to be liable by reason of their conduct?

Mr. Kellam: I ask that the question be clarified. I don't know what he is talking about.

Mr. Garrett: If the Commissioner knows, he is ahead of me right now.

Mr. Fine:

Q. Did you understand the question?

A. I don't know whether I did or not.

Q. We will repeat it. Did you ever get any insurance to cover Enlow and Sons in the event Enlow and Sons created a liability against you?

A. No. My insurance covered that.

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Q. You don't answer my question. I asked you if you got an insurance policy.

A. I had a policy. That would be covering them, wouldn't it?

Q. Did you get a policy on Enlow and Sons?

A. No, I didn't have to.

Q. Did you get one?

A. No.

Q. Then you wanted Mr. Kesser and Mr. Emanuelson to guarantee you that in the event the insurance didn't cover you, that they would be personally liable, is that right?

A. Not on insurance.

Q. I warn you I expect to contradict you. Didn't you tell Mr. Emanuelson and Mr. Kesser both that since the job was let to you and that they did not have the registration with the State of Virginia that you wanted them to protect you in the event that the insurance for any liability in connection with any accident or claims that might happen that they would responsible to you?

Mr. Kellam: We object to the question as being contradictory to the written contract entered into between the parties.

Harold Higgerson.

Mr. Fine:
Q. Answer the question.
A. (Witness doesn't answer.)
Q. Let the record show the delay in the answer which has consumed at least thirty seconds to a minute.
A. That was our agreement.

Mr. Garrett: What did you say?

A. I said that wasn't our agreement.

Dep.
5-30-57
page 66 } Mr. Campbell: One moment. Please read the answer back to Mr. Fine's question.
The Reporter: "A. That was our agreement."
Mr. Campbell: That's what I heard him say.
Mr. Fine: He did say it.
Mr. Garrett: Let the record show I am sitting behind the witness and I can't see his face or his lips moving.

(Off the record discussion.)

Mr. Fine:
Q. In Paragraph 6 of the agreement, what was said as to the following? All claims, liabilities not covered by insurance noted to be obtained in Paragraph 5—

Mr. Kellam: We object to the question as being contradictory to the contract.
Mr. Garrett: He hasn't read the thing to begin with. Read back the last ten words. Paragraph 6 has a lot more than that, if he is going to read it.

Mr. Fine:
Q. Answer my question.
A. Could I see a copy of it?

Mr. Kellam: Second objection. The contract speaks for itself. Before Mr. Fine says the witness is hesitating, let's have it understood whether he is expected to talk now.

A. I am still reading.

Harold Higgerson.

Dep.
5-30-57 Mr. Garrett: I just don't want the notation that
page 67 } it took him sometime to answer.

Mr. Fine:
Q. Have you finished reading it?
A. Ask the question over, please.

Mr. Fine: Read the question back, please.
The Reporter: "Q. In Paragraph 6 of the agreement, what was said as to the following? All claims, liabilities not covered by insurance noted to be obtained in Paragraph 5—"

A. Their signature was on the contract which was to save me from all claims in regard to material and labor because I had insurances to cover the rest of it.
Q. You didn't have all the insurance?
A. I had everythisg that was required.
Q. You didn't have insurance to protect them on it or they protect you on it in connection with—

Mr. Kellam: We object to the statement of counsel. That is for the Commissioner, to decide. He can ask him what insurance he had.

Mr. Fine:
Q. Did you know what insurance you had?
A. I gave them the insurance they required. I called my insurance carrier and told him what I had to have and he sent the certificate to T. E. Ritter Corporation.
Q. That's the only one you had?
Dep. A. That's the only one.
5-30-57 Q. You recollect that now, don't you?
page 68 } A. If it hadn't been what he wanted, I guess Ritter would have wrote me back.
Q. Anyhow, you recollect now that that was the only certificate that was made to Ritter?
A. I don't know how many he had made.
Q. How did you know you had enough insurance?
A. It was up to my insurance carrier to see that I did have. I have been carrying it with him for eight or nine years.
Q. Knowing in this contract that Mr. Kesser or Mr. Emanuelson is going to guarantee any materials or labor on this job—

Harold Higgerson.

Mr. Kellam: Object. Contract speaks for itself. Not for him to say *with* the contract says.

Mr. Fine:
Q. Answer that please, sir.
A. They decided to relieve me of all claims and liabilities.
Q. Nothing in there about material and labor, is it?

Mr. Kellam: Same objection.

A. Materials and labor is a liability.

Mr. Fine:
Q. Nothing in there about that except as to insurance noted to be obtained in Paragraph 5 not covered, is it?
A. That's what the contract says.
Q. You understood that, didn't you?
A. I understood I had to purchase the insurance. They were going to indemnify me against all other claims and liability. In other words, they were a surety to the contract.

Dep. 5-30-57 page 69

Q. Did you understand the contract to be for claims, liability not covered by the insurance it noted to be obtained in Paragraph 5?

Mr. Kellam: The contract speaks for itself.

Mr. Fine:
Q. Do you know that you are very much mistaken, sir? This contract was made on the 1st day of July 1955 and you did not know what kind of certificates to get and the certificate is dated July 6, 1955, five days later and you didn't know what kind of insurance you were going to get? Look at it. July 1st and July 6th, 1955.

Mr. Garrett: Mr. Commissioner, we think counsel ought not to get excited.
Mr. Fine: I don't like for somebody to tell me something palpably wrong and—
Mr. Garrett: We object to your statement as to what is right and what is wrong. That is up to the Court.
Mr. Fine: I am answering my friend. Any time counsel can't state what he has a right to do, he is not much of a counsel.
Mr. Garrett: We think you are able.

Harold Higgerson.

The Commissioner: The man is under cross examination and I think counsel has some leeway as to the manner of questioning him.

Mr. Fine:

Q. In Paragraph 6, it says, "Not covered by insurance to be obtained in Paragraph 5." When you entered into it, you didn't have one, did you?

Dep. 5-30-57 page 70

A. Yes, I had insurance to cover.

Q. But you didn't have because you got your certificate on July 6th, didn't you?

A. My policy is good from one year of February 15th through—

Q. But you had nothing to Mr. Ritter at that time, did you?

A. I don't know.

Q. Don't you know? Look at the date, July 6th.

Mr. Kellam: We would like the record to show that the certificate he is showing is the certificate which has been introduced in evidence and there is no evidence this is the certicate ever furnished to Mr. Ritter.

Mr. Fine: It is the certificate furnished to Mr. Ritter and it is signed by Winn and dated July 6, 1955.

Mr. Fine:

Q. So you were under this agreement to obtain the necessary insurance, is that correct?

A. That's what it says.

* * * * *

Dep. 5-30-57 page 71

* * * * *

Q. When did you make your last payroll?

A. I don't know, sir.

Q. You are asking for a lot of damages and don't know?

A. The records will speak for themselves.

Q. Isn't it a fact that you wanted to have Enlow and Son do some extra work that was not in the contract originally?

A. No, I didn't want them to do no extra work. Ritter told us the State wanted them to put in some extra pipe.

Harold Higgerson.

Q. Did you communicate that to Enlow and Sons, Inc.?
A. I asked them for a price and I gave Ritter a price on the thing. It was a change order is what the job was.
Q. Didn't you ask them to do it?
A. We asked for a price and the man said it was too high.

Dep. 5-30-57 page 72

Q. I didn't ask you that question. I asked you if you didn't ask them to do it.
A We asked for a price and the man said it was too high.
Q. I didn't ask you that question. I asked you if you didn't ask them to do the extra work?
A. No, I didn't ask them.
Q. What did you get a price for?
A. Because we were asked for a price.
Q. But you had no agreement with them for this extra work, did you?
A. No.
Q. Did this job include the extra work?
A. It was an extension of the work that Mr. Enlow did over there.
Q. You are not answering my question, Mr. Higgerson. I know you are a very intelligent man. I asked you, sir, a very simple question. Was the extra work within the contemplation of the parties at the time the contract was entered into between you and Ritter?
A. It was not contemplated.
Q. Exactly. And didn't you get a price from Enlow and Sons?
A. Yes, sir.
Q. And didn't Enlow and Sons tell you that they would not do this work except upon the price submitted?
A. That's right.
Q. And you then told T. E. Ritter Corporation what the price was?
A. I had to. I had to submit a price.

Dep. 5-30-57 page 73

Q. What was your agreement with them if they got the extra work?
A. They got it. The State gave it to them. They were required to do it under the work order.

Mr. Campbell: Who are you referring to when you say "they"?

A. Ritter Corporation.

Harold Higgerson.

Mr. Fine:

Q. They only had a contract with you? They had no contractural relations with the T. E. Ritter Corporation?

Mr. Kellam: Who is "they"?

Mr. Fine: Enlow and Sons.

Q. They had no contract with Ritter or the State Highway?

A. T. E. Ritter Corporation had the contract with the State Highway. I had the contract with Ritter. Enlow and Sons had the contract with Higgerson Brothers.

Q. And you had nothing in the contract with regard to doing any extra work with Enlow and Sons?

A. I was bound to T. E. Ritter Corporation like T. E. Ritter was bound to the Highway Department.

Q. I am asking you if they had any contract with you for any extra work?

Mr. Kellam: Who is "they"?

Mr. Fine: Enlow and Sons.

Mr. Kellam: Object to the question. Contract speaks for itself.

By Mr. Fine:

Q. Answer the question.

A. They were to perform all work under the contract that I had with T. E. Ritter Corporation.

Dep. 5-30-57 page 74 }

Q. They were going to do extra work? That was in contemplation of the parties, wasn't it?

A. It wasn't contemplated when the job was first started.

Q. How could it have been in the contract?

A. It is in the clause in the contract. T. E. Ritter Corporation.

Q. But it was to be done at a price, not at what they directed, isn't that correct?

A. The same unit price they got for the job.

Q. Nothing in there about involving them in connection with this contract, is it? Do you see anything in there?

A. It says, "To perform all work that we are to do." We are bound to Ritter. They are to do it.

Q. It only said in connection with the said project AU191 in accordance with the bid you obtained? Nothing else in there about extra work?

Harold Higgerson.

A. My contract covers the general clauses.
Q. Did you ask them to do the extra work?
A. They gave me a price.
Q. Did they do it?
A. No. They said the price was too high; couldn't use it.
Q. When you got the extra work to do, what did you do?
A. I didn't get the extra work.
Q. Who got it?
A. Vanguard Construction did it.

Dep. 5-30-57 page 75

Q. Then you didn't have to do it under the terms of your agreement?
A. Yes, sir, they charged it to me.
Q. How much did they charge you?
A. I haven't got the bill. It is probably in the file.
Q. Did you charge that to Enlow and Sons?
A. I don't know whether it was on there or not.
Q. You don't know whether you are making claim for that or not?
A. I couldn't say.
Q. Didn't you tell them they didn't have to do the extra work?
A. I didn't tell them. They gave a price and I submitted it to T. E Ritter Corporation.
Q. Didn't you tell Enlow and Sons they didn't have to do the extra work?
A. I didn't tell them nothing.
Q. Why did you ask for a price then?
A. Because I had to give a price to Ritter. He asked me for a price and I had to give him a price.
Q. Didn't you tell them, "Under the terms in the agreement, you are going to breach this contract if you don't do this extra work?"
A. No.
Q. You didn't tell them that?
A. No.
Q. Why didn't you, if it was supposed to be done by you?
A. I wasn't going to pay him the price that he wanted for it. I wasn't going to have them to do it.

Dep. 5-30-57 page 76

Q. In other words, you didn't care for them to do the extra work?
A. They had done moved out not finished.
Q. You already testified they were supposed to do it at the same unit price. Why did you ask them for a price?

Harold Higgerson.

A. Because in the end, the Highway Department provides in the contract that the State has a right to increase or decrease a contract by 25% by unit or a combination of units provided there is no material difference in the type of construction. If there is any difference, it has got to be acceptable to both parties before a work order is issued for it.

Q. Why did you ask for a price?

A. I contended it was worth more money to do the job than what we had the unit price for on the extension.

Q. Did you notify Mr. Emanuelson, whom you allege and claim to be a surety on it?

A. No.

Q. Did you notify Mr. Kesser?

A. No. Wrote a letter and asked for a price.

Q. Didn't tell the surety about the extra work or the terms of the agreement in connection with that, did you?

A. I didn't tell Mr. Kesser.

Q. And you didn't tell Mr. Emanuelson of any *suuposed* liability in it, did you?

A. No, sir.

Q. Either one of them?

A. No, sir.

Dep. 5-30-57 page 77 } Q. Yet you gave the work to somebody else?

A. I didn't give the work to nobody else; no, sir.

Q. Why didn't you ask Enlow and Sons to do it if they were liable on it?

A. We asked them.

Q. You asked them to do the extra work?

A. Yes, sir.

Q. Have you got a copy of the letter on that?

A. Yes, sir.

Mr. Kellam: Yes. Letter dated March 24, 1956, from Higgerson Brothers to Enlow and Sons.

(Mr. Fine reads letter.)

Mr. Kellam: We offer this as an exhibit.

Mr. Fine: Let the record show that my friend's reply is absolutely in contradiction to my question because it shows "If you care to do this work." No demand to do the work, and I want the record to show by some insinuation and inference my friend, Mr. Kellam, feels it would indicate the demand was made to do the work when it is not so.

Harold Higgerson.

Letter dated March 24, 1956, addressed to Enlow and Sons, Inc. Carbon copy to T. E. Ritter. "In *re* Route 17A, Project 186470: Gentlemen: T. E. Ritter Corporation has asked us to submit a price on the extra work on the above-mentioned project, which extra work consists of the following approximate quantities, 670 lineal feet, 42 inch concrete pipe, 2 man holes for 42 inch pipe, 1 Headwall for 42 inch pipe, approximately 6 and a half C. Y. concrete. This extra work is an extension of the present 42 inch pipe down Columbia Street to Louise Street and down Louise Street to the marsh. If you are interested in this extra work, we request you to immediately reply hereto, stating your unit prices for the above items or work. Your unit prices are to show all the materials, labors, tools, equipment, insurances, bonds, and all other costs of doing this extra work including restoring the street services to the satisfaction of the owner.

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"If you are not interested in this extra work, we would like your immediate reply to that effect. Higgerson Brothers."

Q. Did you write that letter?
A. Yes, sir.
Q. And sign it?
A. Yes, sir.
Q. Then you didn't make a demand to ask them to do it? You asked if they would be good enough to do it?

Mr. Kellam: Object to the form of the question. Letter speaks for itself.

A. We asked for a price on the job.

The Commissioner: Letter dated March 24, 1956, "Plaintiff's Exhibit 8."

Mr. Fine:
Q. If it was your primary obligation to do this job for Ritter, why didn't you do it?
A. I didn't feel it was my responsibility.
Q. Why did you let someone else do it?
A. I didn't have nothing else to do but do it.
Q. It was your primary obligation, wasn't it?
A. That is what he contends.
Q. Don't you contend that?

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Harold Higgerson.

A. No, I don't.

Q. Why do you try to make any charge against these people for that?

A. Because T. E. Ritter charged his to us. He said it was our responsibility.

Q. Did you ever tell them it was their responsibility to do this job?

Mr. Kellam: Tell who?

Mr. Fine: Enlow and Sons.

A. I don't know as I ever came out in those certain words that it was their responsibility.

Q. Is it an item of your damage in this case?

A. I don't know whether it has been listed in there or not.

Q. You are the one asserting your claim and you don't know what your claim is; what you are claiming?

A. There are so many items in there. I don't keep up with that. Mr. Hodges takes care of that.

Q. In other words, this idea about this suit that you have here is not your own?

A. Yes, sir.

Q. You don't know what it's all about?

A. I know it's about this job.

Q. Why didn't you tell these people it was their primary obligation to do this extra work?

Let the record show the witness hasn't answered.

Dep.
5-30-57
page 80 } Mr. Garrett: Let the record also show that you are talking to Mr. Campbell. That may be the reason the witness is not answering.

Mr. Fine: Let him answer it.

A. Repeat it, please.

The Commissioner: I don't think the witness has quite had ample opportunity to answer. He was being respectful, it seems.

Mr. Fine: Please read the question.

The Reporter: "Q. Why didn't you tell these people it was their primary obligation to do this extra work?"

Harold Higgerson.

A. I submitted a price. I got a price from them for them to do it. I felt it wasn't my responsibility. That's why I didn't press them to do it.

Mr. Fine:

Q. When did you learn it was your obligation?

A. I haven't learned it was my obligation.

Q. As I take it, you didn't do any extra work on this job yourself?

A. Not that extension you are speaking of.

Q. What other work did you do on this job other than the work contemplated between the parties for which you make any claim?

A. What other work? We had to finish the drop inlets, catch basins.

Q. There was enough money in the job for that, wasn't it?

A. No, sir; not after expenses had been paid.

Q. Do you know how much was in the job at that time?

A. You mean how much money left?

Dep. Q. Yes.

5-30-57 A. I don't know the approximate amount. Re-
page 81 } tainage on such other work hadn't been completed.

Q. Enough money retained by the State and left over that had not been paid to take care of that, wasn't it?

A. Yes, but it was charged to me.

Q. I appreciate that, but there was enough money to take care of those drain inlets, wasn't it?

A. There was money in retainage, yes, sir.

Q. And that money that was in retainage belonged to Enlow and Higgerson, didn't it?

A. Yes, sir.

Q. Do you have a memorandum of what work you did do to complete the job?

A. We have bills here from Carter and Correll.

Q. Have you got those bills?

A. They are here, yes, sir.

Q. You are not familiar with them yourself?

A. I don't know the amount nor how many there were.

Q. Do you know what work had to be done?

A. Yes, sir.

Q. Got a memo of that?

A. Not with me.

Q. Would you get them next time you come here, please, sir?

Harold Higgerson.

Mr. Garrett: I think they are here, Mr. Fine.
Dep. Mr. Hodges, the accountant is here and I think he
5-30-57 has all the information that you just suggested. Is
page 82 } that true, Mr. Hodges?

Mr. Hodges: Yes, sir.

Mr. Fine: It may be he has the information we request but we are asking this gentleman who is mechanically inclined what work has not been done.

Mr. Garrett: You asked him if he could produce it and I am telling you we have it here.

Mr. Fine:

Q. Can you testify as to what work had not been done and how much units?

A. I don't know the exact number of units, no, sir, because the bottoms of the inlets had been poured and the tops had not been finished.

Q. Then you have no idea of the physical work that remained undone, to your knowledge?

A. Not the amount; not the units.

Q. Didn't you take over the supervision at that time of taking inventory of it?

A. Yes. We had a number of catch basins and they were to be completed.

A. Did you take an inventory?

A. We knew how much.

Q. How many basins had to be completed?

A. We knew how many basins had to be completed, yes, and we estimated the yardage.

Dep. Q. Did you make a memorandum?
5-30-57 A. Mr. Carter and I did.
page 83 } Q. But you didn't make a memorandum?
A. We just made it together.

Q. Do you have a copy of it?

A. No, I do not.

Q. Has Mr. Carter a copy of it?

A. He ought to have, yes, sir.

Q. And that is of the drain inlets?

A. Drop inlets, yes, sir.

Q. As a matter of fact, you didn't do anything on this job, did you?

A. I wasn't supposed to do anything.

Q. You were supposed to do something according to the contract. However, you didn't do anything on the job either before or after the work?

Harold Higgerson.

A. No. Mr. Enlow was going to do the work.

Q. After Mr. Enlow wasn't on the job, did you do anything yourself?

A. No, sir. I got Carter and Correll to finish it.

Q. Did you talk to anybody else besides Carter and Correll?

A. Yes, sir. Mr. Malpass; Malpass Construction Company.

Q. Did you consult anybody other than Malpass?

A. No, sir.

Q. Did Malpass give you a bid?

A. He told me what he had wanted per cubic yard to finish it.

Q. He didn't give you an estimate?

A. No, sir.

Dep. 5-30-57 page 84

Q. Never gave you an estimate in writing?

A. No, sir. I have known him a number of years. Didn't require it of him.

Q. How much was it?

A. $150.00 per cubic yard.

Q. How many yards was it?

A. I don't recall. I think about fifty yards; sixty.

Q. Anything else?

A. That's all I can remember.

Q. Malpass was not going to do all the work, were they, or were they not?

A. He said he didn't even want it at that price.

Q. He didn't want it?

A. That right.

Q. Did you consult anybody else?

A. No. I got Carter and Correll to finish it.

Q. What other effort, if any, did you make to get this work done?

A. Other than talking with them, that's it.

Q. Just to Carter and Correll?

A. That's right.

Q. Then you didn't go out into the open market and try to get this work done as reasonable and quickly as you could?

A. No. That was ridiculous.

Q. I thought so. As long as you could try to hook somebody.

A. I didn't try to hook anybody.

Mr. Garrett: That goes beyond the bounds of the question.

The Commissioner: I agree with you but it is in the record.

Harold Higgerson.

Dep .
5-30-57
page 85 } Mr. Fine:

Q. Did you notify Enlow and Sons how much work was left undone and how much it would cost to do it?

A. No. We didn't know exactly how many yards it would take to complete the job.

Q. You did learn after you got the estimate from Malpass, didn't you?

A. No, sir. We don't know the amount of yardage.

Q. Did you consult with Enlow about how much work was undone?

A. He knew how much work was undone.

Q. Did you consult with him as to the price?

A. No, sir.

Q. Did you notify Mr. Emanuelson or Mr. Kesser about the price it would take to complete it or give them an opportunity to do it?

A. No, sir.

Q Why didn't you?

A. They were there and they didn't do it with what they had in it, so why should I consult them?

Q. Have you ever seen Mr. Kesser or Mr. Emanuelson on the job?

A. One time, Mr. Emanuelson.

Q. When was that?

A. I can't recall the date, but he was over there one time that I saw him.

Dep. 5-30-57 page 86 }

Q. As a matter of fact, neither Mr. Kesser or Mr. Emanuelson were ever on that job; aren't you mistaken?

Q. No. Mr. Emanuelson was over there.

Q. You mean after you had breached the contract?

Mr. Kellam: Object.

Mr. Fine:

Q. When was it Mr. Emanuelson was over there?

A. I don't recall the date.

Q. When the job commenced or after you were going to get somebody else to do it?

A. No. They were still working.

Q. The job was in progress when Mr. Emanuelson was there?

Harold Higgerson.

A. Yes, sir.

Q. Then it is reasonable to say and safe to say he wasn't over there after you were going to get somebody else to do it or before you were going to get somebody else to do it?

A. I never seen him.

Q. Have you ever consulted with Mr. Kesser or Mr. Emanuelson before the payment of any of these bills?

A. Which bills are you speaking of?

Q. About the payment of any of the completion of this work?

A. No, sir, I did not.

Q. Did you tell Mr. Ritter when you told them that Enlow and Son, Inc. were going to do this job that they were not registered?

A. No, sir, I did not. I didn't even think about it. Mr. Kesser assured me they were going to get the registration papers.

Q. You didn't think it was necessary to check them any further?

A. No, sir, I did not.

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page 87 }

* * * * *

Q. Do you have a memorandum or do you know how much you paid for the equipment, the rental of equipment while it was on this job?

A. No, I don't.

Q. You don't have any such memorandum or you mean you don't have it with you, your bookkeeper has it?

A. The bookkeeper has it.

Q. Did you receive a bill for the rental of this equipment from Enlow and Sons?

A. Yes, sir.

Q. Let me have it, please.

Mr. Kellam: We hand Counsel copy of letter dated March 24, 1956, written by Higgerson Brothers to Enlow and Sons, c/o Lewis K. Kesser, Adams Building. Photostatic copy of statement dated March 20, 1956 is attached covering rental of certain equipment.

Harold Higgerson.

Mr. Fine: I don't want the letter. I am asking for the original bill.

Mr. Kellam: We offer this in evidence. That's all I have

Mr. Fine : Object to any offer of evidence until he puts his side of it on.

Mr. Kellam: I offer it in evidence and you may object to it, Mr. Fine.

Dep. 5-30-57 page 88 } Mr. Fine: We object to my friend's interrupting the orderly procedure of the examination of this witness when I asked him if he received a bill and counsel said he had the bill. Now my friend on the other side wishes to introduce a letter and the bill. Certainly not responsive. Judgment would indicate to my friend that isn't responsive. I am asking for the bills. He wants to show some letter not responsive to my question. It is true we don't have the Court ruling on it but I think it would to be responsive to my question.

I asked for the bill and my friend wants to introduce the letter. I move to strike it out. You got a letter from them?

Mr. Kellam: I do have a letter from them.

Mr. Fine: I asked you about the bill. That's all I want.

Mr. Kellam: That's the only bill I have; a photostatic copy.

Mr. Fine: I don't want the letter, just the bill. You can introduce it on your own, not while I am examining.

Mr. Kellam: They go together. They were fastened together and that is the only way I have ever seen them.

The Commissioner: Counsel called for the equipment rental bills and I believe you responded that you would supply them. He argues that you have supplied more than he called for. Do you want to supply what the party called for and then introduce the other?

Mr. Kellam: Yes I would like the record to show they were stapled together and that is the only way I have ever seen them

By Mr Fine· This is the only bill for the equipment?

A. Yes, sir.

Dep. 5-30-57 page 89 } Q That total bill is $23,315 and that does not include the use of the truck tractor and other items used from time to time for delivery charges, is that right?

Mr. Kellam: Object to that statement. The bill speaks for itself.

Harold Higgerson.

Mr. Fine: That is what is on there. I want the record to show that it is not the total bill. Fair for me to say so.

Mr. Kellam: I object to the question being asked of the witness when the bill speaks for itself.

Mr. Fine: I would like to introduce that, Your Honor.

The Commissioner: Received and marked "Plaintiff's Exhibit 9."

Mr. Fine:

Q. When was the first time you got a bill from them?

A. That is the first time.

Q. In March?

A. Yes. That is when it is dated.

Q. You never got a bill before March 20, 1956?

A. No, sir.

Q. You are sure of that?

A. I haven't seen it.

Q. You are familiar with the rental of equipment, aren't you?

A. Yes, sir.

Q. I ask you to examine that bill and indicate whether any items on there are unreasonable.

A. (Witness looks at photostatic copy of bill.)

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Q. Do you see any items you consider unreasonable?

A. Yes. I think some of them are charged too high. This pump is too high.

Q. How much?

A. I couldn't tell you.

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Mr. Fine:

Q. The item you referred to was what, sir?

A. All of them.

Q. You changed your mind? All of it is wrong?

A. That's right. I started to point out some of them.

Q. Is the rental of ninety link belt speed one-quarter chain complete? How much is that a month?

Harold Higgerson.

A. I don't know. They have rental set up for that. We don't bid our jobs on book rentals.

Q. As I understand it, you are not in a position to say whether that is a fair or reasonable charge or not?

A. I say we don't charge our jobs in with that kind of rental. Take for instance your Four H pump there. He has got $1,600.

Q. Just a minute. One yard bucket, $116.00 a month. Fair rental or not?

Dep. 5-30-57 page 93

A. That is too high.

Q. How much is it?

A. I couldn't say.

Q. How do you know it is too high?

A. The bucket would cost you about $1,100.00 and in seven or eight months the way he has got it, he could have paid for the bucket.

Q. I am asking you whether the charges are reasonable and fair. If they are not fair, I want you to say so and how high they are.

A. I would say they are all high.

Q. What is the reasonable and fair charge for it?

A. He is 33-1/3 to 50% too high.

Q. Have you rented any recently?

A. No. I don't rent my equipment.

Q. Then you are not familiar with rented equipment?

A. I know. I have been connected with equipment around at different jobs.

Q. You never rented any equipment?

A. Yes, sir. I have rented some.

Q. Did you rent equipment in 1955?

A. Not by the month, no, sir.

Q. Rented it by the year?

A. No, sir.

Q. Rented it by the day?

A. By the hour; for the operator.

Q. How much was it per hour?

Dep. 5-30-57 page 94

A. That depends on the type of equipment you you have got.

Q. I refer you to the ninety link belt speed.

A. I haven't got that sized crane.

Q. You don't know what the rental is?

A. Not the hourly rental.

Q. You can't tell how much it is a month. Can you tell at any time what it is?

A. No, I can't tell you the specific amount. If I set up a

job, I don't put that kind of prices in it. If you did, you wouldn't get a job.

Q. That is probably why you got the job.

Mr. Garrett: If Your Honor please, I submit that is an improper comment.

Mr. Fine: I think it is an observation the Commissioner can take note of.

Q. You didn't bid the job enough to begin with, did you?

A. Yes, sir.

Q. Everybody lost money on the job, didn't they? One yard bucket, how much is that a month?

A. I don't know.

Q. Four-inch centrifugal pump, $200.00 per month.

A. You can buy a new one for $400.00 or $500.00. Why charge $200.00 a month?

Q. What is the life of the one four-inch *centrifual* pump?

A. Depends on how hard you use it.

Q. And using it on that job wouldn't $200.00 a month be fair?

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A. No, sir. We didn't use it that much.

Q. You used it on this job a considerable time, didn't you?

A. No; not that pump.

Q. How many did you use?

A. Well, he had other pumps on there.

Q. Of course he did. Do you know how long he used this pump?

A. No, because he didn't use it steady.

Q. It was on the job?

A. Yes.

Q. How long did the job take?

A. I don't know the exact amount of time.

Q. Didn't it take from July 15th to March 15th?

A. That's what he has got down there.

Q. That's right?

A. Think it is.

Q. The 150 Worthington Air Compressor. What is that worth a month?

A. I couldn't say.

Q. Three inch mud hod pump. How much is that worth a month?

A. Couldn't say.

Harold Higgerson.

Q. Trailer mounted Pacific Pump for jetting well points.
A. I don't know what that is worth a month.
Q. And the jetting pump complete with 400 feet of three-inch hose. Well point system rental. Do you know how much that would be worth?
A. No, I don't know what the rental is on that.
Q. How did you figure the job?

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A. I set it up. I figured it on a monthly basis, 120 days.
Q. The job was going to last from July 15th to March 15th?
A. Yes, sir; entirely too long.
Q. With regard to the rental on the well point system, are you familiar with that?
A. No, sir.
Q. Don't you know much about this kind of work?
A. Yes, I do.
Q. What is the fair and reasonable rental on a Model 89D well point pump?
A. I haven't got those figures with me. We use a book and we figure a percentage we want that rental for the job.
Q. What is this Griffin well phone, five hundred swing joints, 660 degree elbow worth, do you know?
A. I told you I didn't, percentagewise.
Q. Referring to the total, you are not in a position to say it is not fair?
A. I say he didn't charge right for the equipment.
Q. How do you know?
A. He has not charged the book rental.
Q. Didn't you say you had to refer to your books to determine it?
A. Yes, sir.
Q. Do you operate on the same book.
A. Yes, sir.
Q. What book do you operate on?

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A. I figure the percentage. If I want 75% of the rental or 50% of the rental; it depends on what type work you have got. How hard the equipment is used. If it is a hard job, I charge—
Q. I am not asking you that. I asked you what book you used to determine the fair rental?
A. Associated Equipment Rental Book.
Q. Same book they use?
A. I don't know what book they use.
Q. Where did you get your book?

Harold Higgerson.

A. I have got one.
Q. What is the name of the book?
A. Associated Equipment Rental Book.
Q. Will you bring that with you next time? How much did you pay for the equipment, use of the equipment that was not on the job that Enlow and Sons had?
A. I don't know.
Q. Don't you know how much you paid an hour for it or anything else?
A. No. The bills will speak for themselves, the books.
Q. As I take it, Mr. Higgerson, you disagree with the motion for judgment that was prepared by your counsel when they have in Paragraph 2 the following: "As a part of said agreement and undertaking, Plaintiffs agreed to purchase the materials for the job, making the payroll as it becomes due." You disagree with that?

Mr. Kellam: Object to the form of the question whether he disagrees or not.

Mr. Fine: You are taken by surprise?
Dep. Mr. Kellam: I am not taken by surprise.
5-30-57 Mr. Fine: I don't expect you to admit that.
page 98 } Mr. Kellam: Object to it.

By Mr. Fine:
Q. They are wrong when they say that?

Mr. Kellam: Object to it. Object to the form of the question.

Mr. Fine:
Q. You disagree with the allegations contained in Paragraph 2 that you were to make the payroll as it became due?
A. I haven't disagreed to anything. I agreed to make the payroll.
Q. You said you weren't going to put any more money in it. You said you didn't feel you were obligated to.
A. That is right.
Q. So that allegation is incorrect?

Mr. Kellam: That is for the Commissioner to decide, not the witness. The allegations made and the motion for judgment says that the provisions of the contract are certain things and the contract speaks for itself.
Mr. Fine: I have to contradict myself. The motion for

judgment says, "As a part of said agreement and undertaking, Plaintiffs agreed to purchase the materials for the job, make the payroll as it becomes due and to furnish the bonds, insurance, and indemnities that T. E. Ritter requested in the bid for the above project and charge same to Enlow and Sons, Inc."

I will not pursue that further. You need not answer that question. Put it that way.

Dep.
5-30-57
page 99 } Q. As I understand it, sir, you never did make any personal inventory of what had to be done before Enlow would not go along with you on this job?

A. Which job? You mean the completion?

Q. After they had finished the job, on the extra work?

A. Yes, I went over there.

Q. And gave them a list of the extra work?

Mr. Kellam: Gave who a list? I don't follow you.

Mr. Fine:

Q. Extra work to be done, right?

A. This was work they didn't complete.

Q. I am talking about the extra work now. Did you give them a list of that?

A. Yes; in the letter.

Q. Did the extra work come up before the completion of the job or after Enlow and Sons had finished the job?

A. Came up before they left.

Q. Then after Enlow and Sons had done their work, the extra work was done by Vanguard Construction?

A. Yes, sir.

Q. And you had nothing to do with that and didn't care about it?

A. T. E. Ritter was holding us responsible.

Q. Holding who responsible?

Dep. A. Holding me responsible?
5-30-57 Q. You didn't think you were responsible?
page 100 } A. That's right.

Q. Did you pay them anything for it?

A. They held it out of retainage.

Q. How much did they hold out?

A. Approximately $3,000.

Q. Did you agree to it?

Harold Higgerson.

A. No, I didn't agree to it.
Q. Have you litigated it?
A. I turned it over to Mr. Kellam, yes, sir.
Q. Did you notify the sureties about it?
A. No, I haven't.
Q. You didn't notify Mr. Emanuelson and Mr. Kesser?
A. No, sir.

By Mr. Campbell:
Q. Mr. Higgerson, I understood you to say in one part of your cross examination that your obligation is on a contract which originated with the Highway Department?
A. Yes, sir.
Q. To be subject to variance of 25% up or down, as the case may be, and the stated unit price if the work was substantially the same, is that correct?
A. Yes, sir.

Dep. 5-30-57 page 101

Q. By that same token, does it follow that Ritter likewise was obligated to the Highway Department?
A. Yes, sir.
Q. You were obligated similarly to Ritter, were you not?
A. Yes, sir.
Q. You say now that you are not obligated to Ritter because you didn't do this work?
A. I felt I wasn't obligated.
Q. For that reason, you did not go forward to aid the performance of that work *wither* with Mr. Enlow or somebody else?
A. That's right.
Q. Because your interpretation of your agreement with Ritter did not obligate you to do it?
A. That was my interpretation.
Q. Do you still maintain that position today?
A. Yes, sir.
Q. As I understand it, you have retained counsel to sustain that position in court, is that correct?
A. That's right.
Q. That is your sincere belief today?
A. That is my belief, yes, sir.
Q. Is it not a fact that this element of damage that you have asserted against the Defendants in this case is included the item that you say you do not owe Ritter?
A. I believe it is in there. I don't know.

Harold Higgerson.

Q. If that be true, then while you deny the obligation to Ritter and you have engaged counsel to sustain your position, do you honestly believe you don't owe it to Ritter nevertheless norwithstanding the conviction on part having it against the Defendants in this case solely because Ritter made the claim against you?

Dep. 5-30-57 page 102

A. That's right. He made the claim against me.

Q. If you are right in the contention that you have raised with Ritter that if you should be sustained on that, then that would be an improper charge against these Defendants, wouldn't it? You can't collect it twice, isn't that right?

A. That is right.

Q. So the net result of that is that you honestly, sincerely believe that you are not obligated to Ritter and you are pursuing legal rights in that regard; nevertheless, you are asserting a claim against these Defendants on an issue, on an item that you don't feel that you owe by that same token? Do you not feel that they do not owe it to you?

A. If Ritter charges me, I have got to charge them.

Q. That is not the question. If you are sincere in your conviction that you don't owe it to Ritter, you, by that same token, must be sincere in your conviction that the Defendants don't owe it to you? Doesn't that follow?

A. (Witness doesn't answer.)

Q. So, to the extent of $3,000 you feel that that item, as far as these Defendants are concerned, is an item that they should not be charged with because you don't feel that you should be charged with it in the first instance, isn't that right?

A. Well, if we don't get our money, we have got to charge them.

Dep. 5-30-57 page 103

Q. That's not the question. You understood me.

A. If we don't have to pay it, I don't think they should pay it.

Q. Mr. Higgerson, don't wiggle out on me like that. I am not going to let you do it, either. I am going to pursue you. I am going to be as bad as Mr. Fine is on protracted cross examination. You have contended honestly and sincerely that you don't owe Ritter, is that correct?

A. That's right.

Q. You have litigation, if not pending, about to be instituted, because you retained counsel to represent you in that regard and you are hopeful of sustaining your position on that; correct?

A. Yes, sir, that's right.

Harold Higgerson.

Q. Nevertheless, while you are contending in one breath that you are not obligated to Richter, you, at the same time, have pending litigation in which you are now taking the opposite position and you are saying that these people owe you money that you claim was an improper charge against you, isn't that true?

A. No. They don't owe us if we don't owe it.

Q. You are asking in this case that they pay you that amount of money, isn't that right? You can answer that "Yes" or "No."

A. Yes.

Q. And it is your opinion that it is an improper charge?

A. Yes, sir.

Q. That's all.

Mr. Fine:

Q. I haven't finished. Did you, sir—

Dep.
5-30-57 Mr. Kellam: You have finished cross examining.
page 104 } Let me have my redirect.
Mr. Fine: Go ahead.

RE-DIRECT EXAMINATION.

Examined by Mr. Kellam:

Q. Mr. Higgerson, the sum about which Mr. Campbell just questioned you is as to an extra charge made by Ritter against you? Was it deducted from the payments made under the contract to you?

A. Yes, it was.

Mr. Campbell: I object to that, Mr. Commissioner, on the ground that the fact that he may have been placed in an awkward position as far as the claim by the Ritter Corporation doesn't alter the situation that he has already taken the position that it is not a proper charge.

(Off the record discussion.)

Mr. Kellam:

Q. Mr. Higgerson, I hand you a copy of a letter dated March 24, 1956 addressed to Enlow and Sons, care of Lewis K. Kesser, Adams Building, Norfolk, Virginia, and ask you if you wrote that letter to them?

Harold Higgerson.

A. Yes, sir.
Q. That is the one we submitted to Mr. Fine and Mr. Campbell a few minutes ago.
A. Yes, sir, I wrote it.
Q. Did you return the bills to them?
A. Yes, sir.

Mr. Kellam: We offer it in evidence.
The Commissioner: "Plaintiff's Exhibit No. 10."

Dep.
5-30-57
page 105 } Mr. Kellam:
Q. In connection with the extra work which was to be done under the contract that has been put in evidence, the letter which you wrote to Enlow and Sons asking them to give you a price on it. (I am showing it to counsel first and will then hand you a letter from Enlow and Sons, Inc., dated *Marh* 26, 1956, giving you the price on the work, after counsel has read it.)
Did you receive this letter from Enlow and Sons?
A. Yes, sir, we did.

Mr. Kellam: We offer this in evidence.
The Commissioner: "Plaintiff's Exhibit 11."

Mr. Kellam:
Q. After you received that, did you pass the information along to T. E. Ritter Corporation?
A. I did.
Q. After having shown this to counsel, I hand you a copy of a letter dated March 26, 1956, addressed to the T. E. Ritter Corporation, or to Mr. Ritter, that is, and ask you if you wrote and sent that letter to them?
A. Yes, sir.

Mr. Kellam: We offer that in evidence.
The Commissioner: "Plaintiff's Exhibit 12."
Mr. Campbell: With reference to the exhibits, Mr. Commissioner, next to the last one introduced, I invite the Commissioner' attention to the fact that the substance
Dep. of that letter concerned not a sub-contract between
5-30-57 Higgerson Brothers and Enlow but it dealt with a
page 106 } proposal that Enlow would enter into a contract with Ritter for that additional work, which was

not a part of the original contract between Higgerson and Enlow. Is that correct, Mr. Fine?

Mr. Fine: That is correct.

Mr. Kellam: That's all we have.

RE-CROSS EXAMINATION.

Examined by Mr. Fine:

Q. Did you ever correspond any further with Enlow and Sons after you received the letter of March 26th and you wrote T. E. Ritter Corporation; did you write them further?

A. No, sir.

Q. That was the end of the matter?

A. Yes, sir.

Q. And you never made any demands on them to do the work?

A. No, sir.

Q. You never told them anything further about it?

A. No, sir.

Q. When you say "No, sir," you mean you didn't tell them anything further about it?

A. That's right.

Q. When this job was going on and the bank account was in the name of Higgerson and Enlow in the Bank of Commerce and you were signing checks, all the withholding taxes were paid by Higgerson Brothers, is that right?

Dep. 5-30-57 page 107

A. It was paid out of that account. I didn't keep up with the tax matters, the withholding tax. Mr. Hodges did that.

Q. So you can't answer that, and your same answer would be in connection with the federal contributions and also in connection with the state and federal excise tax?

A. I can't answer that.

Q. You don't know whether you regarded the men on the job as your employees or the partnership account?

A. It was not a partnership.

Q. It was a partnership account as far as the bank was concerned.

Mr. Kellam: That is your conclusion.

A. It was a joint account.

Mr. Fine:

Q. In connection with the performance bond, did you give Ritter a performance Bond?

H. Leon Hodges.

A. I did, sir.

Q. You gave them performance bond before you entered into an agreement? I am speaking of the agreement with Enlow and Sons?

A. I believe so. Don't know the date they got it.

Q. When you had a contract with T. E. Ritter, you naturally gave a performance bond to do it?

A. After I signed the contract.

Q. Why did you charge Enlow and Sons $659.61 for the performance bond?

Dep. 5-30-57 page 108 } A. Because it said the insurance and bonds were to be charged to Enlow and Sons.

Q. You mean the performance bond?

A. Yes, sir.

Q. I differ with you on the contract. The payroll taxes, did you pay them yourself or you don't know?

A. I don't know. I can't answer that.

Q. With regard to the item of insurance which you have in here, $2,692 64, do you know what policies that covers?

A. I do not, sir.

Q. That's all.

* * * * *

MR. H. LEON HODGES,

a witness, called in *begalf* of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Examined by Mr. Kellam:

Q. Please state your name, age, residence, and occupation.

A. H. Leon Hodges, 32, Great Bridge, Virginia, partner in the firm of Brock and Hodges, Certified Public Accountants.

Q. Mr. Hodges, in your activities as a certified public accountant, have you kept some of the records for Higgerson Brothers?

A. Yes, I have.

Q. Did you keep the records in connection with their transactions with Enlow and Sons, Inc.?

Dep. 5-30-57 page 109 } A. Yes, sir, I did.

Q. Did you have access to the contract and other papers in connection with this matter when you set up the records and books?

A. Yes, sir, I did.

H. Leon Hodges.

Q. Do you have a statement of all sums which were received under the contract between Higgerson Brothers and Enlow and Sons, Inc., which contract has been introduced in evidence and is dated July 1, 1955 by which Enlow and Sons was to perform certain work called for in the contract with Richter?

Mr. Fine: We object to the introduction of the statement. We object to the question. No foundation has been laid for it or any identification. While I have a great deal of respect for Mr. Hodges as a CPA and as a gentleman, he is not in a position except through hearsay to testify as to what the job is. Ought to be identified by the parties themselves and not by the CPA.

I move to strike out any evidence in connection with any statement as to this gentleman's being confronted with—

Mr. Kellam: We haven't offered any statement in evidence.

Mr. Fine: You are getting ready to. I wanted to state my objection.

Mr. Kellam:

Q. What was done with the money or monies which were received from the contract, that is, the payments, which were paid or made by Richter? What was done with those monies?

Dep. 5-30-57 page 110

Mr. Fine: Wait a minute, please, sir. I don't want to interrupt, but I do want to get my objection in. We object to this line of testimony on this ground, Mr. Commissioner. If this gentleman was on the job and handled all the books for Enlow and Sons and was present when this was done, he may testify; but if he handled this book, checks, things like that after this memo was made, then he is not in a position to testify. Purely hearsay and it is not proper and his testimony is not competent.

Mr. Kellam:

Q. What was done with the checks which you received?

A. The checks were received by Higgerson Brothers, endorsed by a member of the partnership and were deposited in the joint account in the name of Enlow-Higgerson in the National Bank of Commerce.

Mr. Fine: We further object on the ground that is hearsay. He doesn't know that except he has been told that.

H. Leon Hodges.

Mr. Kellam:

Q. Mr. Hodges, have you kept a record or made entries in the book of the amounts of the checks received and the approximate date they were received and whether or not they were deposited in the bank?

A. Yes, sir.

Q. Did you have a set of books or a book in which you were keeping these particular records?

A. Yes, sir.

Q. Were all of the funds received on this particular contract from Richter deposited in this bank account?

A. With the exception of the last three or four payments and if I had access to the books, I could tell you the amounts. All funds were deposited in the account of Enlow-Higgerson.

Dep. 5-30-57 page 111 } Q. Will you refer to your records and tell us when the bank account was opened and the exact name of the bank account?

Mr. Campbell: Mr. Kellam, I wonder if you would yield to me for a few questions which may obviate some further objections?

Mr. Kellam: Yes, sir.

CROSS EXAMINATION.

Mr. Campbell:

Q. Mr. Hodges, is it not a fact that in keeping the books of Higgerson Brothers that you are only reporting those figures, those invoices, and those checks which were turned over to you by Higgerson Brothers?

The point I am getting at is not that I am even suggesting that such could happen, but is it not possible that Higgerson Brothers may have made out an invoice to Ritter, received a check from Ritter, and no record be maintained by Higgerson Brothers and then at the end of the month when you posted the records of the company, you would have no record of such invoice and such a check in return?

A. I would say that that would be practically impossible for this reason. Each check was accompanied by an itemized statement which constitutes a monthly earned estimate and that the check always agreed in the net amount payable on each of the estimate; each and every estimate.

Q. Suppose the estimate had not been turned over to you

H. Leon Hodges.

and the check received in return for it had not been turned over to you?

Dep. 5-30-57 page 112

A. But each estimate takes credit for the payments made on the previous estimate and each time I ascertained that the amounts received for which credit had been taken on the month's current estimate had been recorded on the books and then received and deposited.

Mr. Campbell: That clears it up in my mind. I don't know about my associate here, but I wanted that cleared. Thank you for your courtesy.

DIRECT EXAMINATION (cont'd.)

By Mr. Kellam:

Q. Mr. Hodges, who makes up the estimate upon which the check is issued?

A. The T. E. Ritter Corporation.

Q. Did Enlow and Sons or Higgerson Brothers make up an estimate of the amount that was to be paid to them or was that done by T. E. Ritter Company?

A. Done by T. E. Ritter Company.

Q. You said you deposited these monies in the bank. Refer to your record and tell us when the bank account was opened.

A. The bank account was opened and the first deposit was made July 1, 1955 in the Main Street Office, National Bank of Commerce under the name of Enlow-Higgerson.

Q. How many payments were made? How many deposits, rather, were made to that account by number?

A. (Witness looks at book.)

Dep. 5-30-57 page 113

Q. Can you count each individual deposit?

A. No, sir; by months.

Q. We will skip that for the time being.

A. Yes, sir.

Q. How frequently were checks received or payments received on this contract?

A. Payments were received monthly after the first month that the job had been underway. The current estimate which I have supplied to the Commissioner with the other pertinent data and documentary evidence is in this file and they will sustain the date of the earned estimate and the date on which it was deposited will all appear on the general books.

Q. Did the Defendants have an accountant confer with you and take any information from your records?

H. Leon Hodges.

A. Yes, sir, they did.

Q. Did you make all of the records available to him that you had or all that he asked for?

A. As far as I know, he noted no exceptions or did not have anything to say about it if there was anything he wanted. He didn't tell me there was anything lacking which he wanted to examine. There were some unpaid bills which I had submitted to Mr. Higgerson for use by his counsel which I did not have in my office the day the Defendant's accountant came.

However, I had kept them there approximately four weeks, anticipating his coming and he came in my office on the morning of May 20, which was the date proceeding the trial, the original hearing was scheduled.

Q. Have you made up from your records a statement of all sums which were received, a total of all sums received from Ritter Company on the contract?

Dep. 5-30-57 page 114

A. The books would show that.

Q. Have you made up a statement of that or do you have that where you can turn to it quickly without having to make up different statements?

A. The gross amount which was earned under the contract and was due from Ritter Corporation was $94,078,50 with the following exceptions. Those funds were all received and the exceptions are these three. There was a deduction for liquidated damages in the amount of $630.00; a deduction for the bill attached in the files here; the difference in the contract price and the catch basin, $400.00, and a deduction for the repair of Columbia Street after laying 42 inch pipe, $990.00, and a deduction of $2.00 per foot for 42-inch pipe laid by Vanguard Construction Company, $1,656.00.

Q. What is the net amount received?

A. I will phrase my answer this way. The net amount receivable from T. E. Ritter Corporation, net cash amount, was $90,709.05. Of this total amount of cash receivable, the following amounts were withheld by Higgerson Brothers, not deposited in the joint bank account.

Mr. Campbell: These are funds held by Higgerson and not deposited?

A. Yes, but these funds were received October 5, 1956 to January, (I stand corrected) to May 8, 1957.

Mr. Commissioner, shall I list these amounts? The books would show it themselves. They have been verified by the Defendant's accountant.

H. Leon Hodges.

Dep. 5-30-57 page 115

Q. When you say "the amounts," Mr. Hodges, what do you mean by that? Do you mean each separate check?

A. Yes, sir.

Q. What is the total first?

The Commissioner: I think it would be very helpful to list the amounts withheld.

A. The total amount of cash withheld? I want to verify that from another source. (Witness looks at paper.) The total cash payment received by Higgerson Brothers and retained by Higgerson Brothers and not deposited in the joint bank account was $7,433.76.

Mr. Kellam:

Q. Do you know how that amount of money was disbursed, if it was disbursed?

A. Yes, sir. I can give you some specific items.

Mr. Fine: Mr. Commissioner, I would like for the record to show that we object unless he can show that these items were expended pursuant to this particular job and for building material and so forth in connection with it.

Mr. Kellam: I don't believe you would want to accept our conclusions. That is the reason I asked him to tell you what they were expended for.

Mr. Fine: As long as it is in connection with that, I have no objection.

Mr. Kellam: We won't put in anything that is not in connection with this contract

Mr. Fine: I appreciate that. Our examination shows a number of items that have no bills or anything to support them. I think Mr. Hodges will bear me out on that when I examine him. We'll see.

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A. I have the bills which Higgerson disbursed from their own funds.

The following items were paid by Higgerson Brothers directly from their funds or from funds which credits were taken from the amount of cash received from T. E. Ritter and not involved in the joint account, not deposited in the joint account.

Southern Block, $6,178.41: George T. McLean Company, Inc. $316.99; R. Lee Page and Company, Inc., $659.61; Cotton

Brothers, $115.00; Viola Brothers, $217.20; J. Henry Holland Corporation, $72.17; Portsmouth Paving Company, $2,077.00; Carter Correll Construction Company, $4,043.00; Mutual Insurance Agency of Norfolk, $2,692.64; Internal Revenue Service, $1,278.53.

Q. Do*d* you have a total of those payments to debtors?

A. $17,650.50.

Q. Mr. Hodges, what sum, if anything, remained on deposit in the bank account opened in the name of Enlow-Higgerson?

A. May 15, 1957, the balance on deposit in the National Bank of Commerce, Main Street Office, to the credit of Enlow-Higgerson was $58.43.

Q. Who actually prepared the checks which were drawn on this account?

A. I prepared the checks, sir.

Q. Were any checks drawn against the account and paid by the bank from this account that were not signed by both Mr. Enlow and Mr. Higgerson?

Dep. 5-30-57 page 117

A. No, sir.

Q. What sums, if any, were advanced by Higgerson Brothers before receipt of the first check from Ritter?

A. On August 8, 1955, Higgerson Brothers paid Southern Block and Pipe Corporation, $6,178.41. On August 8, Higgerson Brothers paid George T. McLean, Inc.—

Mr. Fine: Hasn't he ennumerated those?

Mr. Kellam: Do you agree to accepting the total?

Mr. Fine: No. I am talking about these bills and so on. I expect these figures are all right. I imagine they are.

Mr. Kellam: I don't know of any other way to do it if you are not willing to accept it.

Mr. Fine: Go ahead.

A. August 8, George T. McLean, $158.80. Mr. Kellam, that was the total amount disbursed to trade creditors prior to the receipt of the first contract revenue from T. E. Ritter Corporation. There were some advances for payroll. Do you want those?

Mr. Kellam:

Q. Yes.

A. The following advances were made by Higgerson Brothers and deposited in the account of Enlow-Higgerson, July 8, $2,000; July 28, $1,500; August 4, $1,200; August 12, $2,750.

H. Leon Hodges.

Q. Do you have a total of what the trade service was for advances to the joint account; what it amounted to?

Dep. 5-30-57 page 118

A. Let me understand you. Was that before the first receipt from T. E. Ritter?

Q. Yes.

A. The total advances by Higgerson Brothers are payments to creditors from the account of Enlow-Higgerson prior to the receipt of the first money from T. E. Ritter Corporation is $13,787.21.

Q. You said for payment to trade creditors. Does that include advances for payroll?

A. No, sir. By trade creditors, I referred to the Southern Block and Pipe and George T. McLean, trade creditors.

Q. Mr. Hodges, the $13,787.21 advanced by Higgerson Brothers includes the deposits made to the joint account to cover payroll?

A. Yes, sir.

Q. Have any part of those funds been repaid to Higgerson Brothers?

A. Not those funds, no, sir.

Q. Have any other advances been made by Higgerson Brothers for any sums which have not been repaid?

A. Yes, sir.

Q. Would you tell us what those items include?

A. Mr. Kellam, they would be the items which I ennumerated previously, payments to Southern Block and Pipe, George T. McLean, and Page. Those items I previously itemized for you, some ten in number, include all the advances that Higgerson Brothers made to trade creditors for the account of Enlow-Higgerson.

Q. In looking over the figures which you gave me, you gave me an item of Southern Block, $6,178.41 which was paid, funds

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for which were advanced by Higgerson Brothers after Enlow had withdrawn from the job; and then you gave an exact item for Southern Block which you say was for funds advanced prior to receipt of the first check. Is that exactly the same item or are they two separate items with exactly the same figure?

A. You misunderstood me. $6,178.41 paid Southern Block and Pipe Corporation paid August 8, 1955. I understood your question sometime ago to refer to the payments which had been made subsequently to the time Enlow and Sons ceased their operations. I can list those for you if you want to make the distinction.

H. Leon Hodges.

Mr. Fine: That is why I raised the question awhile ago because those two figures were alike.

A. The total advances which Higgerson Brothers made to the account of Enlow-Higgerson for the payment of payrolls which have not been repaid is $7,450.00.

Mr. Kellam:

Q. And the total for trade creditors is $17,650.55?

A. That is correct.

Q. Are there any unpaid accounts and if so, give us the list of them and amounts.

A. From what information I have been able to compile and invoices that Mr. Enlow has given me and Mr. Higgerson has given me, I have determined that the total unpaid invoices charged with Enlow-Higgerson was $2,822.23, May 15, 1957. I would like to ask you about unpaid bills. By unpaid bills, do you mean unpaid withholding and payroll taxes?

Q. Yes.

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Q. The unpaid withholding and payroll taxes as of May 15, 1957 were as follows: Withholding tax, $876.85; Social Security (And I want to interject this) in the last three remaining taxes, they were computed on the net taxable payroll of $12,806.58. That was the payroll for the calendar year of 1956; Social Security, 4% thereof, $512.26; Virginia Unemployment Compensation, 2-7/10% thereof, $345.78; Federal Excise or commonly known as unemployment, 3/10th of 1% thereof, $38.42.

Q. Are there any other unpaid accounts?

A. To my knowledge, no.

Q. Do you have any where a total of all these items?

A. $29,698.09.

Q. Mr. Hodges, the last figure which you gave us for $29,698.09, is that a total of all cash advances, bills paid and unpaid accounts charged to the Enlow-Higgerson contract which have been advanced by or incurred by Higgerson Brothers?

A. That's the total; yes, sir, but in my opinion, that total should be reduced by a credit being made to the amount of necessary cash received by Higgerson Brothers that T. E. Ritter had not deposited in the joint account.

Q. How much is that?

A. $7,433.76. The net balance of the first total being diminished by the cash retained by Higgerson Brothers which he had received from T. E. Ritter Corporation and had not

deposited in the account of Enlow-Higgerson in the amount of $7,433.76 leaves a balance of $22,264.33.

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Q. In that figure, have you taken into consideration a figure of $3,000 called for in the contract?

A. No, sir.

Q. Have you taken into consideration any part of the cash discount saved on bills?

A. No, sir.

Q. Can you tell us what the amount of cash discount saved on bills amounted to?

A. The cash discount saved on bills, $874.98.

Q. What sums, if any, were withheld by Ritter from payments to Higgerson Brothers under the contract?

A. The sums withheld by T. E. Ritter Corporation were all deducted on the eighteenth and final estimate, dated January 31, 1957. These sums were withheld and so deducted. I listed them awhile ago.

Q. Give us the total of them.

A. The total deduction by T. E. Ritter, $3,380.00.

Q. Can you tell us what the deductions were for without going through each detailed figure?

A. The deductions were for three items liquidated damages, differential and contract price and for the charge for $2.00 per foot for additional pipe laid and resurfacing the street where that pipe was laid.

Q. Which of those items, if any, are in controversy between Higgerson Brothers and Ritter? That is, which items, if any, has Higgerson Brothers contended it should not have been charged with?

Mr. Fine: We object to it on the ground that it is hearsay. He wouldn't know.

Mr. Kellam: Go ahead.

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A. Items to which Higgerson Brothers took exception and do not think properly chargeable to them was the deduction covering the 42 inch pipe.

Q. What is that total figure?

A. $2,446.00.

Q. Has Higgerson Brothers received from Ritter the $2,446?

A. No, sir, because it was deducted in the final estimate.

Q. With the deductions has Higgerson Brothers received,

and have you given credit in the figures which you have given here today for all sums due under the contract?

A. Repeat the question, please.

Q. Has Higgerson Brothers received from Ritter and Company, well, have you given credit to the Higgerson-Enlow operation for all sums received under the contract?

A. Yes, sir.

Q. Mr. Hodges, a letter has been introduced in evidence here, dated September 11, 1955 which is "Plaintiff's Exhibit No. 4." It is a letter to Enlow and Sons, R. A. Emanuelson, and Lewis K. Kesser. It has been identified by Mr. Higgerson as signed by him. Who actually wrote that letter?

A. I drafted the letter.

Q. Whose language made up the letter?

A. The language is mine.

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Q. The figures which you have testified to, Mr. Hodges, are they taken from the records which were kept by you on behalf of Higgerson Brothers?

A. All the data that I have given you has come from the records kept by me and all the disbursements paid to the joint account were reviewed by Mr. Enlow and Mr. Higgerson. They both signed each check pertaining to each disbursement and the invoices were there available for their examination if they so desired.

Q. Did you attend a conference at the office of Mr. Kesser, at which a statement was presented of the funds received and disbursed and the performance of the contract was also discussed?

A. During the conduct of the work, I attended two conferences in Mr. Kesser's office. One was during January of 1956 and the other was in April of 1956; but prior to the time there was any conference, I had submitted a statement of the financial condition in the operations of the job dated October 20th, which at that date showed a net loss from expenses recorded on the books, and after the revenue which had been earned as of that date, $3,050.24. I never received any reply or inquiry pertaining to that statement.

About the latter part of January 1956, I was asked by Mr. Higgerson to attend a conference in Mr. Kesser's office and during the latter part of May, there was a second conference in which Mr. Kesser and Mr. Emanuelson, and Mr. Enlow and Mr. Enlow's son and Mr. Higgerson and myself were in attendance.

H. Leon Hodges.

Q. At either one of these conferences was a statement handed to Mr. Kesser or Mr. Emanuelson of the status of the job?

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A. At the conference in January of 1956 or it might have been the first week of February (It was in that immediate vicinity) Mr. Higgerson, Mr. Emanuelson, Mr. Kesser, and I met in Mr. Kesser's office, and I gave him a statement at that date which showed that there was a deficiency in the contract of $7,166.33 and it appeared to me that when the conference was over that somebody was going to have to come up with some money and I wanted all parties concerned to be acquainted with the facts as of that date and that is the purpose I had prepared the statements for.

Q. What did Mr. Kesser say about that, if anything?

A. I had told him that, of course, of the excess, and he looked at the statement and Mr. Higgerson had become alarmed over it and I told Mr. Kesser that was why I was up there which was to acquaint him and acquaint Mr. Higgerson with the facts.

Mr. Kesser told me, and he looked at Harold, he said, "I don't want Harold worrying about a thing. Ray and I signed a contract to save him harmless."

Mr. Campbell: Object to that. I object as far as Mr. Emanuelson's case is concerned.

Mr. Kellam:

Q. Was that the completion of your answer?

A. He said, "And we are going to do that thing."

Mr. Campbell: I object to the answer given by this witness relating any statement made by Mr. Kesser in the absence of Mr. Emanuelson on the grounds of it being hearsay as to Mr. Emanuelson.

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Mr. Kellam:

Q. I understood you to say that Mr. Emanuelson was not there on that occasion?

A. According to the representation made by Mr. Kesser on that day, Mr. Emanuelson was confined to the hospital with a heart attack. He said he didn't want to relay the information we discussed with him on that date because he didn't want to unduly alarm him because of his physical condition.

H. Leon Hodges.

Q. At the conference in April or May whenever the next conference was, who was present then?

A. Mr. Kesser, Mr. Emanuelson, Mr. Enlow, Mr. Enlow's son, Mr. Higgerson, and myself.

Q. What, if anything, was said then about the status of the work and the financial condition?

A. I had prepared a statement dated May 10, 1956, which incorporated all the operations of the contract to that date. I presented each present with a copy of the statement which showed a deficiency of that date of $12,038.67. There were a few minutes spent reviewing it by each party that had a copy of the statement and Mr. Emanuelson looked at Kesser and pointed his finger at him and said, "Lew, you know where this puts you and me?" He pointed his finger at Mr. Kesser and he pointed his finger at himself and said, "Right behind the eight ball."

Mr. Kellam: You gentlemen may inquire.

CROSS EXAMINATION.

Examined by Mr. Fine:

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Q. In these statements that you allege that Mr. Kesser said and the statement that Mr. Emanuelson was supposed to have stated, was the statement made about the $3,000?

A. The statement which I made, as I recall the conversation, Mr. Fine, and that incorporated all my understanding—

Mr. Kellam: Mr. Fine, I omitted to ask him about one other thing. May I say it now before I forget it?

Mr. Fine: Yes, sir.

By Mr. Kellam:

Q. Any sums ever paid from the account of Enlow-Higgerson to Enlow-Higgerson for rental of equipment?

A. No, sir.

Q. Were there any sums paid for rental of equipment?

A. Yes, sir, there were.

Q. I don't mean to individuals, but were they to Enlow-Higgerson or who?

A. They were to parties other than Enlow or Higgerson.

Q. Who were they charged to?

H. Leon Hodges.

A. Charged on the books as disbursements.
Q. That's all.

Mr. Kellam: Thank you, Mr. Fine.

CROSS EXAMINATION (cont'd.)

By Mr. Fine:

Q. When these statements were made, were the statements made about the $3,000 liability?

A. The statements made were just as I stated them.

Dep. 5-30-57 page 127 } Q. I understand but I wanted to clarify the situation. Did Mr. Kesser make a statement about the $3,000 liability or was it $1,000 or $2,000?

A. He made no other statement than what I said.

Q. So far as the contract was concerned, Higgerson was to get $3,000 above anybody else, is that correct?

A. That was my understanding notwithstanding any eventuality.

Q. $3,000?

A. Yes, sir.

Q. You being a certified public accountant, what is the difference between an audit and a certified statement?

A. Being a certified public accountant, I have to abide by the rules of conduct of the American Institute of Accountants. They set up a code of auditing proceeding and accounting principles and when you certify to a statement, you have to certify in accordance with the code. It is quite a lengthy thing.

Q. That's all right. That answers my question. You have a number of items on which you did not see the statements of the bills on them? It was on information, is that correct?

A. Not in number, no, sir.

Q. Let's see if I can help you. See if there weren't quite a number of them. Isn't it a fact, sir, that there are items as follows: $65.00, $400.00; $300.00, $200.00; $965.00 which indicated no invoices?

Mr. Kellam: We object to the question until we know what he is asking about. I don't know what particular items he is mentioning. He is taking a figure and there may not be an invoice for any such figure as that and there may not be a charge.

H. Leon Hodges.

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page 128 } A. Mr. Commissioner, may I make a statement?

The Commissioner: Better to be responsive to the questions of counsel. If anything is not clear, you can make a note of it and clear it up later.

Mr. Fine:
Q. Is that right?
A. I want them itemized to whom they were paid and I think I can satisfy your inquiry.
Q. Mr. Creef, $54.00.
A. Mr. Enlow asked me to draw a check for that item. I recall it was for fuel and he signed a check and I, in turn, got Mr. Higgerson to sign it.
Q. But you have no bill on that?
A. We could not locate a bill for it.
Q. How about the item for Viola Brothers?
A. What is the amount?
Q. $400.00, April 6, 1956.
A. Here is the invoice covering that, Mr. Fine. There is credit which I took for the payment; the balance of the account, $217.20 I have listed with the unpaid invoices.
Q. Did you have a bill for that? That is charged to Higgerson Brothers, isn't it?
A. It all pertains to the job.
Q. How do you know it pertains to that job?
Dep. A. I have gotten a half dozen phone calls in my
5-30-57 office. I have no legal interest in this. Those
page 129 } people purported it pertains to this. Mr. Enlow never questioned it. He signed the check to pay the $400.00. That was the status of it as far as I was concerned. He was an interested party.
Q. How about the item of Parker Brothers?
A. What is the amount?
Q. $300.00.
A. Here is the invoice, Mr. Fine, for the balance, which is unpaid. It is addressed to Enlow and Higgerson, Adams Building, Norfolk, Virginia.
Q. That wasn't available when Mr. Gable was there?
A. That was not available for this reason. During the latter part of April Mr. Gable called me to see the records. I told him to get authority to see them from you and Mr. Kellam, Counsel for Mr. Higgerson. I have faithfully car-

ried these records back and forth between my home and the office during that period of time until May 20th and Mr. Gable walked in my office completely unannounced May 20th and wanted to examine the records.

I had let Mr. Kellam see these to prepare the list of unpaid invoices and to tabulate the balance due Higgerson Brothers and they weren't in the office on that date for that reason.

Q. So they were not available to Mr. Gable at that time?

A. No, sir; but I want you to understand there was a reason for it.

Q. With regard to Parkway Esso, $200.00. That bill was not available to him either, was it?

Dep. 5-30-57 page 130 } A. No, sir, and I want you to see that, too.

Q. And you have the same answer for that?

A. Yes, sir. It was a partial payment on the account balance of $128.00, Parkway Esso Service Center.

Q. Do you have invoices and checks for the following? Caton Brothers.

A. That should read "Cotton Brothers."

Q. $115.00?

A. Yes, sir. That is this invoice.

Q. Do you have a check for it?

A. Yes, sir. That was paid by Higgerson Brothers.

Q. How was it paid by Higgerson Brothers?

A. By their check. I made the notation on it, on the invoice paid by Higgerson Brothers, their check for $817.00 dated July 6, 1956.

Q. For the rental of equipment?

A. For the items as set forth on the invoice.

Q. That is rental on equipment?

A. Seven hours rental on loader and eight and a half hours rental on loader.

Q. Total of $115.00?

A. That is correct.

Q. Going back to the Viola Brothers, that was not available and that was equipment rental, too, wasn't it?

A. It is my understanding it was equipment rental, yes, sir.

Q. Viola Brothers. How was that paid?

Dep. 5-30-57 page 131 } A. By check, $217.20 which had "By Higgerson Brothers No. 818," dated July 6, 1956.

Q. For equipment rental?

A. Yes, sir, a balance on which we made the

partial payment of $400.00 which you inquired about previously.

Q. Were the rest of these items paid by check or just charged?

A. Which items?

A. Portsmouth Paving, $105.00. All of those items were paid by check, by Higgerson Brothers check. For the record, I want you to be satisfied I have the invoice here for your examination.

(Off the record discussion.) (Short recess.)

Mr. Fine:

Q. Mr. Hodges, in connection with the bills we have just gone over during the short recess, those bills are all charged to Higgerson Brothers, are they not, rather than to Higgerson-Enlow?

A. I want to refer to the invoices one by one.

Q. All right.

Mr. Fine: I would like to have them introduced, if Your Honor please, so we can check them. I understand there were several jobs going on. Let the record show it.

Mr. Kellam: Object to that statement. If counsel wants to testify—

Mr. Fine: We will be able to prove it. We will show it.

Mr. Kellam: All right.

Mr. Fine:

Q. Would you please show us the bills that are charged to Higgerson Brothers rather than to Higgerson-Enlow?

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A. I submit bills from R. Lee Page and Company, Inc., addressed to Higgerson Brothers, Hickory, Virginia.

Q. Let me see if I can save time. Would you go through all of those bills and see which bills are charged to Higgerson Brothers and take them out?

Mr. Kellam: Wait a minute. That is what he is doing and he wants to say what bills he is submitting to you.

A. We can have the Commissioner identify them.

Mr. Kellam: I would like for him to put it in that way.

Mr. Fine: I don't see the necessity for it.

H. Leon Hodges.

A. Invoice from R. Lee Page and Company, dated August 15, 1955, addressed to Higgerson Brothers for contract bonded T. E. Ritter Corporation, $659.61. Statement of George T. McLean and Company, Inc., dated May 14, 1956 in the amount of $108.19, covering two invoices one invoice for one piece 5/8th inch steel, $2.09.

Q. I don't care about the items at this time. Just want the name of the company and the amount.

Mr. Kellam: That's all right. We offer these exhibits.

Mr. Fine: I suggest they be counted together and put the number of them there are and number that and save all of us a lot of time.

A. Statement of George T. McLean Company, Inc., by their letter of June 6, 1956, $50.10. Statement of Viola Brothers, dated May 16, 1956, showing an unpaid balance of $217.20. Statement of Portsmouth Paving Company, Inc., dated July 31, 1956, $1,927.00. Statement of Carter Correll Construction Company, January 1, 1956, $4,043.00.

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Q. Any other bills charged to Higgerson Brothers that were charged to this particular job?

A. Statement of City of Portsmouth Water Department dated May 1, 1956, $6.94. That is all I have here in my files. The invoices and statement from Southern Block and Pipe Corporation were all addressed to Higgerson Brothers and constituted the total cost of $42,577.43. There is one fact I want to call to your attention that when the contract money got behind, I conferred with Mr. Goodman, the Southern Block and Pipe man, who was then President. He informed me that they wouldn't change the name of the account because they weren't going to extend the credit to Enlow-Higgerson.

The contract was then Higgerson Brothers and Ritter Corporation as far as they were concerned and all subsequent bills were billed Higgerson Brothers. That is this file. I have invoices of Viola Brothers dated August 5, 1955 and October 4, and one in the name of Enlow-Higgerson and the second one in the name of Higgerson Brothers. I submit the Viola invoice dated October 4, 1955.

I submit a statement of George T. McLean and Company, month of July 1955, $164.30. I submit statement of George T. McLean and Company, Inc., dated, well, its for the period of July 30, 1955 to August 25, 1955, $590.75. I submit five invoices of George T. McLean Industries, Inc., accompanied

by an adding machine tape stapled there to and the total amount of $448.00 marked "paid 9/10/55, check number 25."

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Statement of George T. McLean Company, Inc., period covering August 26, 1955, September 23, 1955; total amount of $649.15. Statement of George T. McLean Company, Inc., period September 29, 1955 to October 17, 1955 in the total amount of $401.78. Statement of George T. McLean Company, Inc., October 26, 1956. November 21, 1955, that is; $634.42. McLean and Company, November 30, 1955, December 28, 1955; $414.24. George T. McLean, January 21, 1956, total amount $591.96. George T. McLean, dated January 26, 1956, February 21, 1956, total balance due, $803.26.

Q. In fairness to you, I think you ought to make a statement for the record.

A. I call your attention to the fact that I am carrying forward the balance from the preceding months and such balances incorporated in the balance which I indicate to be the balance at the end of the period covered by the statement from which I am reading.

Statement of McLean, February 28, 1955, March 20, 1956, $601.06. McLean, April 29, 1956. Correction, March 29, 1956, April 21, 1956, $807.90. City of Portsmouth Water Department, January 1, 1956, $24.10. Statement Portsmouth Paving Company, August 31, 1955, $275.35. Portsmouth Paving Company, September 30, 1955, total amount $51.53. Portsmouth Paving Company, October 31, 1955, in amount of $42.00; Portsmouth Paving Company, November 30, 1955, in the amount of $36.00.

Portsmouth Paving Company, Inc., March 31, 1956; covering eight invoices itemized thereto, total amount $348.86. John C. Holland Enterprises, December 29, 1955, $1,750. Hall Hodges, Inc., September 1, 1955, $18.03. John C. Holland

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Enterprises, November 15, 1955, $15.00. Industrial Service Company, covering invoice dated November 18, 1955, which invoice is addressed as follows: "Higgerson Brothers, H. A. Enlow and Sons" in the amount of $85.50.

Mr. Fine, according to my hurried examination of paid bills and unpaid bills, bills paid by Higgerson Brothers, those are the invoices addressed to Higgerson Brothers.

Q. Mr. Hodges, have you got a segregation of the amounts spent by Mr. Higgerson after he had made his last deposit with Higgerson-Enlow account?

H. Leon Hodges.

Mr. Fine: I would like to introduce these. Put a rubber band around them, Mr. Commissioner.
The Commissioner: "Plaintiff's Exhibit No. 13."

A. Mr. Fine, I would prefer to establish some definite date so I will know from which point I am working. The last deposit of money I received from T. E. Ritter Corporation—

Mr. Fine:
Q. That is not what I want to know.
A. I am going to establish the date and then I will tell you. The last deposit of money I received from T. E. Ritter Corporation is earned revenue on this contract which check was payable to Higgerson Brothers and deposited in the account of Enlow-Higgerson, National Bank of Commerce, Main Street Office, Norfolk, Virginia, was May 11, 1956.
Q. I asked you if you had a statement since that time?
A. I can give you item by item.
Q. Have you got it? Answer my question "Yes" or "No."

Mr. Kellam: Do you have a separate statement with only those items listed there on it?

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page 136 } A. No, sir, I do not have that statement.

Mr. Kellam: Explain what you do have.

A. I have a statement of the account on the books of Enlow-Higgerson Brothers for a period of July 8, 1955 to May 15, 1957.

Mr. Fine:
Q. I am not interested in that. After May 11, 1956, Mr. Higgerson stopped depositing to the credit of Enlow-Higgerson account?

Q. Refer to your record, please, and tell us from the time beginning July 8, 1955 to May 11, 1956, how many payroll checks or cash was made by Enlow and Son, Inc.
A. I am going to refer to the books.
Q. Naturally, you do. You can't carry it in your mind.
A. I do not have any checks issued to H. A. Enlow and Son to pay payrolls. In the absence of having any checks,

H. Leon Hodges.

being acquainted with any other effects, I will have to tell you I don't think Enlow and Sons paid any payrolls, to the best of my knowledge.

Q. Certainly your records don't show that, do they?

A. No, sir.

Q. And you got your records, of course, from information given you by Mr. Higgerson?

A. No, sir. Mr. Enlow signed each check issued. As much information came from him as Mr. Higgerson. He brought me the bulk of the invoices. He had access to the examination of all of them.

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When I drew a check to pay a bill, I always attached the invoice or statement to it. He had a first-hand access to everything that I have here.

Q. Wasn't it a matter of *accomodation* between the parties that a number of blank checks would be signed by Mr. Enlow for the *accomodation* of Mr. Higgerson?

A. I don't recall Mr. Enlow ever signing a check, blank check, because he was always available. I requested Mr. Higgerson do that and he did sign some checks for payroll. The checks require two endorsers.

Q. Would you want to say on your oath that you say Enlow and Sons never advanced any payroll, any money for payroll?

A. There were two advances made but I don't know what they were made for. There was an advance that I have credited on the books.

Q. Will you tell us about that?

A. Dated February 24, 1956. I gave Mr. Lewis K. Kesser certificate of credit for it, $350.00. April 12, 1956 there was a deposit made in the account of $256.00.

Q. Any other credits given?

A. I credited the $256.00 to H. A. Enlow and Sons, Inc. Let me make one more referral. I have a recorded deposit, December 1955, $846.20. In the absence of knowing where it came from, I credited it to Enlow and Sons and they were repaid on December 8th, $846.21. They were repaid on December 8th.

Q. Do there appear to have been advances made by Enlow and Sons for payroll?

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A. It may have been. When I went through here awhile ago, I looked through ten months of transactions. There is the account and the books would be part of the record.

Q. Who prepared the payroll?

H. Leon Hodges.

A. I did.

Q. Did you have enough money without these advances of $350.00, $256.00 and $846.21 for the payroll?

A. Quite frequently the payroll was overdrawn.

Q. On these specific occasion for payroll, do you want to refer to your records?

A. What date?

Q. I have the following dates: 24th of February, April 12, 1956, December 8, 1955.

A. (Witness looks at book.) Relative to the $350.00 deposit in the account on February 24, the account was overdrawn on that date in the amount of $25.39.

Q. And you issued checks subsequent to that?

A. That is the balance I am carrying on the check stub, pertaining to the check of April 12th—

Mr. Kellam: What year?

A. 1956.

Mr. Fine:

Q. There is only one in 1955 and the rest is in 1956?

A. Pertaining to the deposit of April 12, 1956 in the amount of $256.00, prior to that deposit, the account was overdrawn $249.37.

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Q. Refer to the one of December 1955.

A. The deposit on December 8, 1955 in the amount of $846.21, I credited to H. A. Enlow and Sons, Inc. It was repaid on December 11, 1956.

Q. What was the payroll of that particular week?

A. The net payroll covered by the check drawn December 9, 1955 was $846.21.

Q. So it was for an advance to the payroll?

A. Yes, sir. I would assume so; yes, sir.

Q. Do you know what occurred between April 12, the last time Enlow and Sons advanced $256.00 and May 11, 1956 when they stopped depositing money in this account?

Mr. Kellam: Object to the form of the question. "What occurred"? What does he refer to?

Mr. Fine: Let the witness answer. He is an intelligent man.

Mr. Kellam: What occurred with reference to what? That could cover everything in the world that happened.

H. Leon Hodges.

Mr. Fine:

Q. Do you know why Mr. Higgerson stopped putting money in there after May 11, 1956?

A. Mr. Higgerson didn't stop placing money in to pay for the account of Enlow-Higgerson after May 11th.

Q. Didn't I understand you to say a moment ago that the last time he deposited any money to the account of Enlow-Higgerson was May 11, 1956?

A. Yes, sir, that's correct; but subsequent to that date, Higgerson Brothers disbursed some thousands of dollars for that account.

Dep. 5-30-57 page 140

Q. I asked you why they didn't deposit anymore in the Enlow-Higgerson account?

A. I don't know why.

Q. Do you know why they took it out of their own account instead of Enlow-Higgerson account?

A. I just told you, Mr. Fine, I don't know.

Q. If you will, Mr. Hodges, tell us did you discuss with Mr. Higgerson about his obligation to make the payroll?

A. We have had a lot of discussion about this contract.

Q. I am asking you did you discuss with him his obligation with the payroll?

A. I don't remember any specific occasion that I did.

Q. Did he discuss it with you?

A. The general gist of all of our discussions was the fact that he wasn't pleased with the progress made on the job and he was concerned about getting his money back when it was completed.

Q. Right; and he stopped making any more payroll payments?

A. We have established that, sir.

Q. How did you break down the insurance charge in this case?

A. It is computed on the net amount of payroll subject to the premiums and the rates charged by the insurance carrier applied to such payroll subject to the premium.

Q. Have you got a breakdown?

A. Here it is.

Dep. 5-30-57 page 141

Q. This particular policy came into effect on February 15, 1955, didn't it?

A. That's correct, yes, sir.

Q. Did you pro-rate it?

A. Mr. Fine, the rates were the same for the policies, the two policy years which covered the period during which the work had proceeded. Rates being the same, the

earned premium would be the same, regardless of whether you broke it down by policy years or not.

Q. Do you have any specific policy on this job from July 8, 1955 to May 11, 1956?

A. There is no specific policy but the coverage is incorporated in the comprehensive liability policy which Higgerson has and which is shown by the invoice which you have before you.

Q. As I understand it, you took the premium for the whole year and then took the other premium for the bodily injury and the property damage and just charged them $2,692.54?

A. That is grossly incorrect. It wasn't computed that way.

Q. How was it computed?

A. Let's first understand what the earned premium is based on. The earned premium is based on the payroll subject to the premium at the premium rate. For example, the total payroll subject to the premium $42,899.66 rate for the workmen's compensation was $3.9-1/8 per $100.00 a payroll, so your earned premium based on the $42,899.66 payroll subject to the premium was $1,680.43. That was for the time the job was in progress.

Q. Can you state the date on that?

Dep. 5-30-57 page 142 } A. I can give you the dates covered by the payroll which would be what it is based on.

Q. Can you give me a bill indicating the charge of $2,600.00 and some odd dollars? You have an earned premium here of $1,680.43?

A. For workmen's compensation.

Q. What period does that cover?

A. The duration of the job.

Q. What is the duration of the job?

A. From July 1, 1955 to January 31, 1956, which is the date of the 18th and final estimate.

Q. As I understand it, you have charged them for insurance even after they were off the job?

A. No, sir. That is incorrect, Mr. Fine.

Q. When were they off the job?

A. Let's understand this. The earned premiums for this coverage of insurance is based on the payrolls and all the payrolls that were paid pertain to forces employed under Mr. Enlow's supervision.

Q. Did you charge them any premium after they made deposits on Enlow-Higgerson, the account? In other words, May 11, 1956 was the last time any deposits were made to that joint account; right?

H. Leon Hodges.

A. Yes, sir.
Q. Did you charge them any insurance after May 11, 1956?
A. No, sir, because all the payrolls on which the earned premiums were based were paid prior to that time.

Dep. 5-30-57 page 143

Q. After May 11, 1956, there were payrolls?
A. No, sir; none.
Q. No payrolls at all?
A. No, sir.
Q. Nobody worked on the job?
A. The sub-contractors, the parties employed to complete the unfinished work.
Q. You didn't charge them with the premium?
A. No, sir.
Q. Let's go to the next item in connection with the bodily injury.
A. Computed in the same manner, sir.
Q. You charged them for what period of time?
A. The period encompassed by the payrolls which were from the period of July 1, 1955 through August 26, 1956.
Q. August 26, 1956?
A. Beg pardon, April 26, 1956, which was the date of the last payroll. I submit it for your examination.
Q. And the income item, what did you do about that?
A. It was computed in similar amount.
Q. Have you got a check on that?
A. The check can be gotten which was issued to pay the total premiums on all the policies.
Q. As a matter of fact, what you did is charge this job with this amount of money $2,692.64, but incorporated that amount in another check payable to the agent, is that correct?
A. Yes, sir, that is correct.

Dep. 5-30-57 page 144

Mr. Fine: I would like to introduce that, may it please the Court.
Mr. Kellam: That is the only work sheet he has. We will make up a copy and submit it to him. Only record he has.
Mr. Fine: That's all right.
The Commissioner: "Defendant's Exhibit No. 3."

Mr. Fine:
Q. What was the amount of insurance after May 11, 1956?
A. That is what I have tried to explain to you, Mr. Fine. All the insurance expense is based on the payrolls. There

were no payrolls after the date of April 26, 1956 so there would not have been any insurance.

Q. Then the payroll subsequent to that was made by the party that financed the job, is that correct? Carter and Correll?

A. I don't know who made the payrolls. That was encompassed in this agreement to complete the work.

Q. That insurance you have there did not cover Enlow and Sons, Inc.?

A. That is out of my line, Mr. Fine. I am an accountant.

Q. This memo you have here shows the insured as Higgerson Brothers, is that correct?

A. That is not a memo. That is an auditors report for the earned premium.

Q. Isn't the customer's copy of the insurance part attached to it?

A. What do you mean?

Q. Customer's copy?

A. This is addressed to Higgerson Brothers.

Q. And it shows they were the insured?

Dep. 5-30-57 page 145

A. That is the caption above this name, yes, sir.

Q. And that shows they were the insured and not Enlow and Sons, is that right?

A. You will have to thresh that out yourself. It is out of my line.

Q. Certainly Enlow and Sons did not sign any check on that, did they?

A. No, sir. I heretofore said it was paid by Higgerson Brothers check.

Q. And there would be a rebate coming back on that? It is a mutual company, isn't it?

A. Not always. It depends on the experience rating of the policy holder.

Q. How much rebate have you gotten back on that, do you know?

A. I don't recall.

Q. Can you refer to your records and indicate what the rebate was that was returned?

A. Mr. Fine, I don't have the records with me with that information in it.

Q. You can get it?

A. Yes. The agent would furnish you with it.

Q. I am asking you to furnish it. You keep all the records, don't you, of this outfit?

A. I don't feel it incumbent upon me to thresh through the

H. Leon Hodges.

bills to get something for your convenience when you could make a phone call and get it.

Q. You are representing to the Court that that is the correct amount of premium, aren't you?

Dep. 5-30-57 page 146

A. According to these computations.

Q. But you don't further represent that you don't have a credit, do you, on that?

A. You don't know until two years hence if you are going to get any experience credit.

Q. When was that paid?

A. I don't recall the specific dates.

Q. Was it paid in 1955?

A. Each year the amount owed to the agent is always settled in full.

Q. It has been a few years since you first made the first payment; isn't that true?

A. This is 1957. I couldn't say. I have been recalling from memory and I couldn't say because I don't remember.

Q. But your account is not accurate because there may be a credit due, is that correct?

A. That is one of those contingent things. It may or it may not be.

Q. Would you represent to the Court that you haven't got a credit for it?

A. For this, to my knowledge, they never have.

Q. You are not sure? You would have to look it up?

A. I would have to look it up, but I certainly remember there has never been any dividend on it.

Q. Have you received a dividend in the past?

A. I don't distinctly remember. I work for a lot of clients. You ask me something pertaining to this individual. If I had the records before me, I would reveal it.

Dep. 5-30-57 page 147

Q. If the dividend was payable, who would get the check?

A. The insured should get the check.

Q. And that is Higgerson Brothers, isn't it?

A. In this case, the insured's name no the copy if Higgerson Brothers.

Q. In addition to that item, do you know how many items there were that you paid for the rental of equipment?

A. Yes, sir. I will give you those items; item by item.

Q. Name them, please.

Q. Payments to Norfolk Contracting Company, July 14, 1955, $72.15. Check dated July 21, payable to H. A. Enlow.

H. Leon Hodges.

According to his representation it is to reimburse him in the sum of $20.00 for the amount he paid an operator who was operating on the city dump to back fill for him.

Q. Did you pay H. A. Enlow?

A. The check was payable to H. A. Enlow.

Q. For rental?

A. Yes. He represented it to be the amount he paid out of his pocket August 11, 1955, Norfolk Contracting Company, $1,411.70; August 11, 1955, Viola Brothers, $95.00; September 10, 1955, Norfolk Contracting Company, $581.00; September 10, 1955, Portsmouth Paving Company, $275.35; October 9th, Norfolk Contracting Company, $350.00; October 9th, Viola Brothers, $272.00; November 10th, Viola Brothers, $410.20; November 14th, Norfolk Contracting Company, $211.00; November 14, Temple Trucking Company, $150.00; December 10th, Industrial Service, $85.50; December 10, 1955, Norfolk Contracting Company, $156.00; December 10, 1955, Temple Trucking Company, $150.00; January 1th. Nottingham Hauling, $86.52; January 12th, Temple Trucking Company, $50.00; February 4th, Industrial Service; total amount of payment to them on that date was $642.72 of which $239.25 was for equipment rental.

Dep. 5-30-57 page 148

March 12th, Cotton Brothers, $72.50; March 12, W. H. McGann Corporation, $12.10; April 6th, Viola Brothers, $400.00; July 6, 1956, Cotton Brothers, $115.00; July 6, 1956, Viola Brothers, $217.20; January 16, 1957, George T. McLean and Company, $50.00.

Q. Did I understand you to say on May 11. 1956 this job was concluded?

A. That was the day the actual work was concluded, in that approximate vicinity of time.

Q. What was the equipment used subsequent to that date?

A. That was for invoices dated prior to the date the work ceased.

Q. In other words, the bills were incurred prior to May 11, 1956, which you subsequently paid?

A. Yes, sir.

Q. What was the total of all those equipment items? Did you add them up?

A. Yes, sir. Total amount disbursed for equipment rentals, $5,491.47.

Q. Would you refer to your unpaid bills and see whether or not you have a bill there of Enlow and Sons for equipment?

H. Leon Hodges.

A. I do not have that bill, sir.

Q. I am speaking of the first month, the equipment.

Dep. 5-30-57 page 149

A. I never recall seeing but one bill from Enlow and Sons. That was the bill discussed earlier this morning. I gave it to Mr. Higgerson and he returned it. I would like to interject this statement, Mr. Fine; that after the work was terminated and Mr. Enlow and his forces had moved from the job site, there were several invoices and statements I got during the course of the summer, July and August.

Q. After May 11, 1956?

A. That was the date of the last payment. The last payroll was dated April 26, 1956.

Q. That is when he deposited the money to his own account?

A. Who? Let's get this thing straight.

Q. Let me clarify it. You don't have to refer to your book. You say May 11, 1956 was the last date there were deposits made to Enlow-Higgerson, didn't you?

A. Correct.

Q. Therefore, Mr. Higgerson deposited the credit account to Higgerson Brothers and made payments from his partnership funds; from his own partnership funds, Higgerson Brothers?

A. That is correct.

Q. Do you know why he did not pay for the rental of the equipment to Enlow and Sons, Inc., of your own knowledge?

A. He told me that he thought—

Q. I mean of your own knowledge?

Mr. Kellam: He wouldn't know except what was told him.

Mr. Fine: That's hearsay.

Dep. 5-30-57 page 150

Mr. Kellam: You asked him why he didn't pay it.

Mr. Fine: If he knows of his own knowledge. He only knows what somebody told him, which is not competent evidence.

Mr. Kellam: You asked him why Mr. Higgerson did not pay it.

Mr. Fine: Of his own knowledge.

The Commissioner: All of this argument is making a big record

H. Leon Hodges.

Mr. Fine:

Q. With regard to cleaning the inside of the pipelines, who did that?

A. That expense didn't have to be incurred because a portion of the cleaning was incorporated in the charge of Carter and Correll. It is my understanding that they had access to some fire hydrants and furnished the pipe and they had several big rains during the fall and that they satisfied the inspectors and other interested parties that the pipes were clean; that they would clear themselves, and that item of expense was never incurred as such.

Of course, during their work, I understand they cleaned out the drop inlets and furnished the pipe from the fire hydrants.

Q. So there is no item charged for cleaning the inside of pipelines?

A. No, sir. I think you should appreciate this statement stated July 31th, and the final stages of the work was done during the latter part of 1956, in the fall; so at that date, that was the estimate.

Q. Resurfacing the street; who did that work?

A. Portsmouth Paving Company.

Q. Did they do that work after May 11, 1956?

A. I would have to refer to the invoices.

Dep. 5-30-57 page 151

Q. Have you got those?

A. They are in there.

Q. They are all in there?

A. Yes, sir.

Q. They have already been introduced in evidence as exhibits, is that correct?

A. Yes, that's correct.

Q. Do you have a breakdown (I am not speaking of the extra work involved on this job that was supposed to have been done by Carter and Correll but after May 11, 1956) of what work they did do, physical work? Do you have anything like that?

A. It is itemized on their invoices. The work which Carter and Correll has done for which they have been paid by Higgerson Brothers is itemized on this, on their invoices. Those are all the records to which I have access.

Q. Who did the work after May 11, 1956?

A. Carter and Correll and Portsmouth Paving Company.

Q. Was the job completed on May 11, 1956 after Enlow and Company went off the job?

A. No, sir.

H. Leon Hodges.

Q. When was the job completed? So far as the original contract was concerned, when was the job completed? Do you know of your own knowledge?

A. I would say this. I think you could determine by referring to Carter and Correll's invoice, the latest date of the invoice which they submitted because they finished the last work.

Dep. 5-30-57 page 152

Q. Did they finish the last work and the extra work, too?

A. What do you mean by extra work, sir?

Q. You remember this morning when I examined Mr. Higgerson, he stated that Ritter wanted them to do some extra work other than what was contemplated between Enlow and Higgerson. Remember?

A. Let's be specific now so I will be sure I know what you are talking about and you will know what I am talking about.

Q. Extra work not in contemplation of the parties and he said it was necessary to do some work and he asked Enlow and Sons to give a price on it.

A. You are referring to the 42 inch pipe?

Q. Yes.

A. Let's call it such so we will know what we are talking about.

Q. Up to that time, what had to be done to complete the job?

A. The tops of the drop inlets had to be completed. The pipe had to be cleaned out and the pipe broken off.

Q. The pipe cleaned out? That is out of the picture. No cost on that so don't talk about that. Is that correct?

A. It had to be done whether or not any cost was on it.

Q. No cost to it. Drop inlets and what was the next item?

A. Pipe ends protruding through the drop end had to be broken off. All of that is clearly described.

Q. You said the drop inlets?

A. Had to be completed. The pipe which was protruding in the inlets had to be broken off and cement poured in the bottom of the inlets to bring the water level up to the invert of the pipe.

Dep. 5-30-57 page 153

Q. Anything else?

A. The street had to be resurfaced.

Q. Anything else?

A. That is all I recall right now.

Q. And you were on the project frequently, weren't you?

A. Yes, sir.

Q. How often were you on the job?

H. Leon Hodges.

A. I would conservatively estimate during the first four months, it was once a week.

Q. After May 11th, were you on the job frequently?

A. No, sir. I would say I visited the job site five times after April, after Mr. Enlow's forces moved, which date was April 26th.

Q. Did you make the contract with Portsmouth Paving Company?

A. No, sir.

Q. Did you make a contract with Carter and Correll?

A. No, sir.

Q. Know nothing about the details on that?

A. Know nothing about it other than the written document.

Q. Was Higgerson Brothers trying to frighten Kesser and Emanuelson and the corporation by putting down an item of $7,500.50 for cleaning the inside of pipe lines? Do you know why they did that?

A. From my understanding, that was what they estimated it would cost to clean it.

Dep. 5-30-57 page 154

Q. They were trying to bluff them a little bit?

A. No, sir. I, myself, from my own inspection determined there was about eighteen or twenty inches of dirt in one of those things.

Q. Are you an engineer or an accountant?

A. I think I know something about engineering, too, but I don't qualify as an expert.

Q. You thought that item of $7,500.00 was a proper charge?

A. If the pipe had been cleaned out, it would have been.

Q. Where did you get the figures from?

A. Mr. Higgerson's estimate, I told you.

Q. He made that up?

A. He conferred that with me and we made that up, yes.

Q. In connection with the item of finishing the manholes and drop inlets, he didn't have any such figure on that, did he?

A. At the time this statement was made, that was the amount which Carter and Correll had agreed to finish the manholes for and the drop inlets.

Q. Have you got any correspondence on that?

Mr. Kellam: Yes, sir. We will show it to you.

Mr. Fine: You just let me examine him, Mr. Kellam. You have done that throughout this case.

Mr. Kellam: I have his file. I will hand it to him.

H. Leon Hodges.

Mr. Fine: You know that is not proper.
Mr. Kellam: You asked the witness a question and I have his file. You don't want me to hand it to him?
Dep. 5-30-57 page 155 } Mr. Fine: I want him to answer my questions without you interjecting yourself in.
Mr. Kellam: I have the file and I want to hand it to him.

(Hands file to witness.)

Mr. Fine:
Q. You have a letter?
A. That's the letter. Yes, sir.
Q. Was this contract acted on?
A. That was the unit price which they completed the work for.
Q. Were payments made pursuant to that letter?
A. Yes, sir, according to the invoices which Carter and Correll tendered.
Q. Were checks made payable to that or on that, rather?
A. Yes, sir.
Q. In connection with that, do you know how many feet, the price on that was $100.00 per cubic yard?
A. That is correct.
Q. Do you know how many cubic yards there were?
A. You would have to measure each class of drop inlet.
Q. What was the price of Enlow on that, do you know?
A. Which type of inlet now are we going to talk about?
Q. In connection with the extra work?
A. The inlets were bid a lump sum per class of inlet.
Q. How much did they say they would do it?
A. For standard D1-3E curved drop inlets—
Dep. 5-30-57 page 156 } Q. I am not talking about that. In accordance with this agreement, I will read it to you. "Carter and Correll Construction Company complete the following basis for the sum of $100.00 per cubic yard of concrete for the actual cleaning of the outside basin and the cost of breaking off the protruding pipe."
What did they charge per cubic yard of concrete?

Mr. Kellam: Who?
Mr. Fine: Enlow.

A. I was attempting to explain. Please try to follow me that in the contract which Higgerson Brother had, the T. E.

H. Leon Hodges.

Ritter Corporation, in which Enlow and Sons, Inc., were related with, the drop inlets were bid lump sum per inlet, so you would have to know how many cubic yards was in each type of inlet to determine.

Q. Did you figure it?

A. I didn't, no, sir.

Mr. Campbell: May I interject a question here out of order? Do you have in these exhibits a bid submitted by Enlow for this extra work? We are dealing with the extra work, are we not?

Mr. Kellam: I was just going to hand this to him, but I was afraid Mr. Fine would object.

Mr. Campbell: Mr. Fine, here is what you are getting at.

Mr. Fine:

Q. As a matter of fact, wasn't Enlow and Sons more reasonable than the Carter-Correll Company?

Mr. Kellam: Let the record show Mr. Fine is referring to a bid made by Enlow and Sons to do extra work and the question directed to Mr. Hodges had to do with the work to complete the contract. They are entirely two separate items.

Dep. 5-30-57 page 157

Mr. Fine: No. I am going to show you what this says. They bid on it with the understanding they would get this extra work. At this writing, the three basins south of Gosport would be completed on the next contract.

Q. Is that right?

A. That is what the letter reads. Are you asking me to pass judgment on what it refers to?

Q. You are an intelligent man.

Mr. Kellam: Let me present to you the acceptance of the contract under which they performed which shows that the items he is referring to had nothing to do with the contract and he didn't perform them.

Mr. Fine: You are testifying, Mr. Kellam.

Mr. Kellam: I am presenting to the Commissioner a copy of a letter dated June 4, 1956 from Higgerson Brothers to Carter and Correll, relative to doing certain work to complete the contract. We offer it in evidence as an exhibit for the Commissioner's information.

H. Leon Hodges.

Mr. Fine: I submit that that isn't pertinent to what I asked this gentleman. Here is the bid, if Your Honor please, which is subsequent to that. This is June 4, 1956 and that is July 16, 1956. My friend has again got the thing unintentionally in error.

Q. That is the latest item, isn't it, July 16, 1956?
A. I don't know if it is the latest.
Dep. Q. You can read.
5-30-57 A. It is later than the date of that letter but I
page 158 } don't see the relationship you are trying to get me to establish.

Mr. Fine: I would like to introduce these letters.
The Commissioner: June 4, 1956, "Plaintiff's Exhibit No. 14." This has already been introduced as "Exhibit 11." July 16th, Carter and Correll to Higgerson Brothers, accepted and marked "Defendant's Exhibit No 4."

Mr. Fine:
Q. Did you actually make the contracts for Higgerson Brothers, or did Mr. Higgerson do it?
A. I did not make it, sir.
Q. You wrote this letter, didn't you? I am referring to "Plaintiff's Exhibit No. 14."
A. I don't recall writing it, no, sir.
Q. You didn't handle that?
A. I don't recall it.
Q. "LHH," who is that?
A. L Harold Higgerson.
Q. You didn't have anything to do with that?
A. I don't recall having had anything to do with that.
Q. Then as I understand it, did you ever *given* Enlow and Sons an opportunity to do this extra work or *givem* them any opportunity to do it?
A. I want to refer to my file. When you use the pronoun, "you" are you referring to me individually?
Dep. Q. I am referring to Higgerson Brothers, your
5-30-57 client.
page 159 } A. I don't know whether Higgerson Brothers did or not.
Q. With regard to the work that was not in contemplation of the parties, Carter and Correll Construction Company, did you pay them any money for doing that extra work?
A. They were paid the total of $4,043.00. You refer to the

work as "extra work," Mr. Fine, and I disagree with the terminology for this reason. The work they did was not extra work. It was completing unfinished work.

Q. That is what I am trying to get it. After that work had been finished, Carter and Correll Construction Company did the extra work, didn't they, that you asked the other people to do the work on, Enlow and Sons, didn't you?

A. Mr. Fine, so we will understand each other, you keep repeating "extra work."

Q. Let me make myself clear to you. Enlow and Sons were asked to bid on this extra work which your client or your people thought was not necessary for them to do?

A. So we will have a common knowledge of it, let's refer to it as additional 42 inch pipe.

Q. Did you have anything to do with that?

A. I saw the letter. I wrote the letter to H. A. Enlow and Sons, requesting the price.

Mr. Campbell: Did Carter and Correll lay that 42 inch pipe?

A. No, sir.

Dep. 5-30-57 page 160 } Mr. Fine:

Q. Who did?

A. Vanguard Construction.

Q. You had nothing to do with that?

A. No, sir.

Q. So Carter and Correll were out of the picture after they had completed this job?

A. As far as Higgerson Brothers after they completed the drop inlets and catch basins and whatever else was done in the pipe, as far as I know, they were finished.

Q. And you have no other correspondence with any other firms in connection with completion of this work?

A. Not to my knowledge. The only thing I have knowledge of was an oral conversation with Mr. Malpass.

Q. Did you consult with the Vanguard Construction Company or other people to get the best price possible in order to mitigate damages?

A. No, sir. I never consulted with Carter and Correll. When you say "you," I get confused.

Q. Did Higgerson Brothers confer with anybody else to try to get the lowest price possible on the job?

A. I don't know.

H. Leon Hodges.

Q. No correspondence in the file on it?
A. I don't know about that.
Q. You have the whole file?
A. No, sir. They do a lot of things that I don't know whether they have written anybody or requested a price.

Dep. 5-30-57 page 161

Q. Is there another file out that you know of?
A. Well, there is a whole filing cabinet.
Q. In connection with this job?
A. I don't know whether there is anything pertaining to that or not.
Q. During all this period of time for the completion of this job by Carter and Correll, did you ever write Mr. Emanuelson or Mr. Kesser and put them on notice about how much difference it was going to be or ask them to help complete the job or anything as surety?
A. I put them on notice on three separate occasions that there appeared to be a deficiency and on May 10th, I think they were conscious of approximately how much it was going to be.
Q. I didn't ask you about that. I am talking about before this job was completed.
A. I told you I did. I gave them, I testified earlier, furnished them with financial statements on three separate occasions.
Q. You are not answering my question.
A. Isn't that giving notice?
Q. I am asking you if you told them at any time how much Carter and Correll was going to charge to complete this job?
A. No, sir, you didn't ask that question.
Q. You never did, did you?
A. No, sir.
Q. You just went ahead and—
A. Higgerson Brothers made the arrangements with Carter and Correll.

Dep. 5-30-57 page 162

Q. In connection with the other items retained by Ritter Company you gave them a credit, as I take it, of approximately $2,700.00? There was a total of $3,380.00, as I have it here.
A. They were not given that credit. They took that credit as a deduction on the final estimate.
Q. I understand, but of the $3,380.00, there was $2,646 which is in dispute by Higgerson Brothers with Ritter, is that right?

H. Leon Hodges.

A. That's correct, yes, sir.

Q. What other items from the $3,380.00 was deducted?

A. Liquidated damages in the amount of $630.00, and the difference in the contract price on the concrete per cubic yard of catch basin on change order No. 1, $104.00.

Q. Have you got it there?

A. Yes, sir.

Q. Let me have it, please.

A. (Witness hands paper to Mr. Fine.) Here is the bill in the amount of $104.00 and here is the bill in the amount of $2,646.00.

Q. There is another bill, isn't it?

A. For what?

Q. Total—

A. That reduction was explained in the phase of the final estimate in damages. Quoted as follows: Less liquidated damage fourteen days at $45.00, $630.00.

Q. In other words, there was a delay of fourteen days?

Dep. 5-30-57 page 163

A. I understand, Mr. Fine, there was an assessment of damages for forty or fifty days and this is the amount which Ritter charged back to Higgerson.

Q. Charged back to Higgerson fourteen days?

A. Yes, sir.

Q. How much a day?

A. $45.00.

Q. Who agreed to do that?

A. Well, the commencement was made in the original to lay the pipe in one hundred and twenty days and Mr. Enlow was out there from July 1st to April 26th before he finished it. What else is there to do but agree to it?

Q. Did you consult with Enlow and Sons about that?

A. Not me, personally, no, sir.

Q. Higgerson Brothers consulted you?

A. I don't know.

Q. Did you consult with Mr. Kesser about that?

A. I don't know.

Q. Did Higgerson Brothers consult with Mr. Emanuelson?

A. I don't know.

Q. The occasions of not paying the payroll, what delay did that cause?

A. None.

Q. Did Mr. Higgerson refuse to make further payrolls in

H. Leon Hodges.

to the credit of the Enlow-Higgerson account?

Dep. 5-30-57 page 164 } A. It is my understanding that he maintained the position that he shouldn't have to.

Q. I understand that. That is what I wanted you to say. Thank you. Then you paid that money of the fourteen days at $45.00, have you?

A. It was not paid, Mr. Fine. It was deducted in the amount which T. E. Ritter Corporation remitted to Higgerson Brothers.

Q. Do you agree to that?

A. Mr. Fine, it isn't in my purview to agree or disagree.

Q. You don't know that Higgerson Brothers agreed to it, do you?

A. I know they are going to have to agree to it.

Q. You think it is a just charge, don't you?

A. Beyond any question, yes.

Q. How much delay did you have in completing the job?

A. I have just previously stated that in the original contract, they obligated themselves to lay the pipe in one hundred twenty days, and Mr. Enlow's forces were there from the 1st of July 1955 to April 26, 1956.

Q. Doesn't the contract provide for circumstances beyond their control and bad weather and calendar days? You are familiar with the contract.

A. It is not written in Ritter's contract.

Q. Uou are not going on the legal phase of it?

A. That is out of my line.

Q. You didn't consult with the Defendant in this case? So far as you are concerned, you have taken an active part in this matter and have been on the job several times a week?

Dep. 5-30-57 page 165 } A. Well, I have seen Mr. Enlow a number of times. I never made any specific mention to him of it but I think he would have had common knowledge. He knew the job wasn't finished when he left it and he knew that he had the obligation to go back and finish it.

Q. You know that Higgerson Brothers were supposed to make the payroll and refused to do it and refused to pay for the rental on the equipment?

A. The rental of the equipment, according to my understanding, they weren't obligated to pay.

Q. You are trying to be a lawyer?

Mr. Garrett: You are asking him to be one.

H. Leon Hodges.

Mr. Fine:

Q. Anything in there saying they were going to furnish equipment on the job?

A. No, sir.

Q. Why do you say you paid the rental equipment of $5,-400.00 if they were supposed to get the equipment free of charge?

A. I am a little confused.

Q. That is the calculations they gave us. $5,490.47.

A. Here is what I would like the clarification of. You interject the phrase, "they were supposed to get the equipment free."

Q. According to what you say.

Mr. Kellam: Mr. Commissioner, that is a question for you to decide, not for him. Why Higgerson made payment of a certain bill or Higgerson and Enlow made payment of a certain bill may be within his knowledge, but it would be hearsay. He wants him to put it in.

Dep. 5-30-57 page 166

The Commissioner: It seems to me he can answer the question. If he doesn't know, he can say so.

A. The equipment rentals were paid from the account of Enlow Higgerson and I conferred with Mr. Higgerson and told him that it wasn't my understanding that those items were covered in the contract with Enlow because it was an assumption on my part that Enlow and Sons were equipped to do the job.

He said, "If the money is there, we will go ahead and pay it. We will do anything to help them along. After that when there was a bill for equipment rental to pay, I drew the check and attached the invoice to it, showed it to Mr. Enlow, he signed it and I subsequently got Mr. Higgerson to sign it.

Q. You didn't calculate this job and figure it as a CPA, did you?

A. No, sir.

Q. I thought you didn't. Did you agree to this bill of February 13, *157* of $104.00, T. E. Ritter Corporation against Higgerson Brothers, dated February 13, 1957?

A. Mr. Fine, it never was at my discretion to agree or disagree. They made it as a final reduction of the amounts due on the contract.

Q. That item is still in dispute, isn't it?

H. Leon Hodges.

A. I don't know.

Mr. Fine: I would like to introduce that.

Mr. Kellam: You have two items. We would like to put them both in together.

Mr. Fine: I want them one at a time.

The Commissioner: "D-5."

Dep.
5-30-57
page 167 } Mr. Fine:

Q. I hand you this undated bill and ask you when was that bill received and rendered?

A. May I confer with Mr. Kellam?

Q. I am asking you. If you don't know, say so.

A. This bill was rendered and attached to the eighteenth and final estimate, January 31, 1957, $2,646.00.

Q. Mr. Hodges, if there is something you need to clarify, go ahead and confer.

A. Mr. Fine, sometimes you are a little ambiguous. I don't say that to be critical. I want to call to your attention that these estimates do not necessarily run in numerical sequence. Wherever there is a missing link in the sequence, it is because during the period covered by that missing link, no work was performed by Enlow and Sons or by Higgerson Brothers for which payments were to be received. I want to introduce the earned estimates as submitted by the T. E. Ritter Corporation.

Q. I didn't ask for that. I asked for that top sheet which refers to this bill. Don't go into anything else. You let me handle my case like I want to.

A. I submit estimate 18 and final, January 31, 1957.

Mr. Fine: I want these two clamped together as one exhibit.

Mr. Kellam: He wants these two together. There was another paper, too. If we are going to attach one part of the statement, we will attach them all.

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page 168 }

Mr. Fine: All right. Call the three papers Exhibit 5. February 13th, February 7th, and January 31, 1957.

The Commissioner: Those two additional papers are added to "Exhibit D-5."

Mr. Fine:

Q. For the purpose of this job, Enlow and Sons and Higger-

son Brothers, so far as your records are concerned, all your records indicate that these employees on this job for social security, withholding tax, unemployment insurance, and liability insurance were all working for Higgerson Brothers, is that correct?

A. No, sir. My understanding of the situation is that they were working for H. A. Enlow and Sons and were covered by the various items related to Higgerson Brothers.

Q. Didn't you draw a Higgerson Brothers check for social security?

A. I drew a check on the Enlow-Higgerson account payable to Higgerson Brothers to reimburse them for social security and withholding taxes which they had previously paid to the Internal Revenue Service which covered withholding and social security tax on wages of employees employed by Enlow and Sons, Inc., under the terms and provisions of the contract.

Q. However, their dealings were reported to the government as being employed with Higgerson Brothers?

A. I did it. I am totally responsible for it.

Q. But the fact is that so far as the United States Government is concerned and the Commonwealth of Virginia is concerned, all of that shows that they were employed by Higgerson Brothers?

Dep. 5-30-57 page 169

A. The employees were reported on the payroll tax returns as Higgerson Brothers because by so doing, we saved the difference between 2.7% and 2.5% on the unemployment compensation. When the $4,500.00 labor was involved, it was $800.00 or $900.00. I did it on my own volition, without consultation with anyone.

Q. You did that yourself?

A. Yes, sir.

Q. But the fact is that the records do show they were employed by Higgerson Brothers?

A. Yes, sir.

Q. Your payroll shows it, doesn't it?

A. I have the payroll and I will let the payroll speak for itself.

Q. It shows me they were employed by Higgerson Brothers.

A. The payroll is made out "Enlow-Higgerson" for each and every week during the operations.

Q. And you had other payroll, too, didn't you?

A. Other payroll for who?

Q. Higgerson Brothers.

A. Of course they had a payroll.

Q. Where were the other jobs located?

H. Leon Hodges.

A. Let me get my dates straight now. There was a job at the Marine Corps Air Landing Field at New River. I stand corrected. I mean Edenton.

Dep. 5-30-57 page 170

Q. You had some other jobs?

A. I am trying to link them up.

Q. Take your time.

A. A job was started at Williamsburg, Virginia, but I don't recall the date.

Q. You have all their records here, don't you?

A. Whose records?

Q. Higgerson Brothers.

A. No, sir.

Q. Do you have any of the other books or accounts with regard to other jobs?

A. No, sir.

Q. You don't have them with you?

A. No, sir. These books and the data I have been giving you were kept separate and distinct from all other records.

Q. Did you give them copies of the withholding statements to the employees pursuant to the revenue code?

A. I did for the calendar year of 1955.

Q. That showed they were employed by whom?

A. Higgerson Brothers corresponding with the payroll tax returns.

Q. As a matter of fact, these very same contractors, McLean, Viola Brothers, Carter and Correll, also worked for Enlow and Sons? I mean they worked for Higgerson Brothers, on other jobs, didn't they?

A. Let's name the contractors and I will tell you.

Dep. 5-30-57 page 171

Q. George T. McLean.

A. No, sir.

Q. Didn't do any work for them in 1955 or 1956?

A. None to my knowledge.

Q. Didn't use any of the equipment?

A. No, sir. Higgerson Brothers have their own equipment.

Q. Why did they hire equipment on this job?

A. This wasn't Higgerson Brothers' job, Mr. Fine.

Q. They did the job, didn't they?

A. Yes, but they in turn sub-let it to Enlow and Sons, Inc.

Q. They didn't sub-let it, did they?

A. That is my understanding

Q. That's a legal question. Did Viola Brothers do a job for Higgerson Brothers in 1955 and 1956?

A. Not to my knowledge.

Q. How about the Industrial Service Corporation?

H. Leon Hodges.

A. Higgerson Brothers bought some parts from them but the amount of the purchases has been negligible. Don't know of any equpiment they had which Industrial Service handles now. I do remember one time they bought some teeth for a dragline bucket.

Q. What about Carter and Correll?

A. The only relationship I know of between Carter and Correll and Higgerson Brothers is that Higgerson Brothers rented some self-propelled scrapers for an air field several years ago.

Q. They don't do much renting of equipment?

A. Higgerson Brothers? No, sir.

Dep. 5-30-57 page 172

Q. They weren't familiar with the price of rental equipment, were they?

A. I would say Mr. Higgerson is very familiar with the going price of rentals.

Q. If he didn't rent any of them, how would he be familiar?

A. When you are in the contracting business you have the common knowledge of what the equipment rents for. It is one of the arts of the trade.

Q. He doesn't have to refer to the book as he said he would have to?

A. He would certainly look at it. In the conducting of his business, he gets around enough and gets enough ads from E. V. Williams or McLean, stating the current rental on their equipment and what the current market is.

Q. Weren't you present when Mr. Emanuelson and Mr. Kesser were present and the demand was made for the rental of the equipment and Mr. Higgerson told them in Mr. Kesser's office that he would pay them for the rental of the equipment and let it ride until he got rid of the job?

A. I was present on one occasion when Mr. Emanuelson was there. I have been in Mr. Kesser's presence twice. Never at any time was there any conversation about the rental of equipment that I recall. Certainly I never recall Mr. Higgerson saying to let it ride that he would pay for it when the job was finished.

Q. He was pretty well tied up financially at that time? He couldn't meet the payroll. He had several of these jobs going on. When he had to go out and borrow $250.00 for payroll shows he was a little bit financially tied up? I don't mean *involvment.*

Dep. 5-30-57 page 173

A. I would have to refer to the books at a given time. Couldn't say from memory.

Q. Considering the jobs he had, when a man

H. Leon Hodges.

has a job of this kind, it is pretty tough to go out to borrow for the payroll?

Mr. Kellam: Object. Nothing in the record to show Mr. Higgerson went out and borrowed $250.00. The records shows that $250.00 was advanced by Mr. Kesser or Enlow and Sons to cover some of the payroll.

Mr. Fine: I am going to show you by evidence in this case that he wanted to borrow this money and Mr. Kesser advanced it for the benefit of Higgerson Brothers. We will show it, and he went out and borrowed $250.00.

Mr. Garrett: I think your testimony ought to be taken cautiously there.

Mr. Fine:

Q. With regard to the other jobs, were they handled in this set of records, Enlow-Higgerson?

A. Yes, sir. The only job handled in this set of records was the Enlow-Higgerson.

Q. Do you know how many jobs were going on at that time?

A. I don't know how many jobs but I have tried to reiterate that the only thing this set of books pertains to is the Enlow-Higgerson bank account, the facts and transactions surrounding the conduct of that contract.

Dep. 5-30-57 page 174

Q. Isn't it a fact that Higgerson Brothers didn't have enough money to take up the discounts on these bills as they agreed to do?

A. No, sir, that is not a fact.

Q. I expect to contradict you. Weren't these bills paid subsequently at the completion of these jobs as you have indicated just a few moments ago?

A. That's correct, but those bills which were paid subsequent with the exception of about $100.00 paid McLean, were not discountable bills.

Q. Don't you know in this trade you can get 2% ten days if it is paid promptly?

A. I do not know it. I know it quite to the contrary.

Q. I expect to contradict you on that.

A. I would like to call your attention to the fact that this was a 2% deduction made on Viola Brothers. They disallowed it and charged it back.

Q. Your testimony is that Higgerson Brothers got all the discount on all the terms while this job was in progress?

H. Leon Hodges.

A. Substantially 100%
Q. Wasn't 100%?
A. I said "substantially."
Q. How many did they miss out?
A. I would have to check the invoices. The amount would be impossible for me to remember.
Q. Would it be as much as several hundred dollars?
A. No, not as much as several hundred dollars.
Q. Would it be as much as $50.00?
A. No, sir.

Dep. 5-30-57 page 175

Q. In connection with the insurances that were to be obtained by Enlow and Sons, they got all the insurance that they could get on this job?
A. I personally called Mr. C. Edgar Winn, who is the owner of the Mutual Insurance Agency of Norfolk, who wrote the policies that were examined previously during the hearing. He told me we could make all grades of endorsement we wanted to but there was also coverage in the comprehensive liability insurance under the policy.
Q. Did you call him after this contract was signed?
A. I called him sometime during the first week that Mr. Enlow was working.
Q. That would be after the contract was signed?
A. Yes, sir.
Q. So, it is perfectly true and proper to say that when this contract was executed between Enlow and Sons and Higgerson Brothers that the insurances had not been covered at that time?
A. Yes, sir, they had been covered at that time.
Q. You didn't know it?
A. Wait a minute. I knew it. There is an automatic provision in the comprehensive liability policy covering all subcontractors.
Q. Did you know it?
A. Yes. Several years ago I insisted they get that kind of insurance.
Q. Did Mr. Higgerson know it?
A. Yes, sir.

Dep. 5-30-57 page 176

Q. Why did you get the certificate of insurance dated June 5th, which was five days after this contract was executed?
A. Mr. Fine, that is required by the general *cntractor*. Every contract you enter into you have to furnish the certificate.

H. Leon Hodges.

Q. Exactly. So that certificate was obtained after the execution of this contract?

A. I don't know when it was obtained.

Q. Let's refresh your memory. Dated July 6, 1955.

A. I will say this. The date is relatively unimportant, relatively insignificant, for this reason. Mr. Winn will furnish us any number of these certificates which Higgerson Brothers may request at any time which they in turn at some date subsequent to the expiration of the policy would furnish any general contractor on which they have concurred a contractual liability.

Q. It had to be shown that the contract was dated July 1, 1955 and this is the date, July 6, 1955.

Mr. Kellam: We would like for the record to show that Mr. Fine has been referring to a certificate of insurance which has the date July 6, 1955 and which is certainly what is furnished Mr. Fine at his request and filed in a bill of particulars and which was obtained from Mr. Winn by my office just a few days prior to the time that it was furnished to Mr. Fine after this suit was instituted, and the certificate was not in our possession if it was issued prior to that time.

Mr. Fine:

Q. No contention about the fact that that date is correct, July 6, 1955 and this is a carbon copy and signed by the agent which speaks for itself. That's correct, isn't it?

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A. What do you want me to say is correct?

Q. July 6, 1955 and that is a carbon copy in which T. E. Ritter Corporation will have to be notified if it is going to be cancelled within ten days?

A. That is correct, and it certainly states it covers under workmen's compensation and general liability.

Q. The performance bond that you charged them $659.61, that performance bond was originally paid by who to the agent?

A. Paid by Higgerson Brothers to R. Lee Page and Company.

Q. Afterwards you charged it to Enlow and Higgerson, didn't you?

A. Yes, sir, and I did that on the ground of Paragraph 2 in the contract.

Q. When you charged that to Enlow and Higgerson ac-

count, that bond was not endorsed by Emanuelson and Kesser, was it?

A. I don't know, sir.

Q. Don't you know it wasn't.

A. I don't know, sir. I have never seen the bond.

Q. Let's see if you don't know. You know that the performance bond was given prior to the execution of this contract, don't you?

A. Mr. Fine, all I know about the bond is that I saw the invoice for it.

Q. And the invoice was prior to July 1, 1955, wasn't it?

A. I will have to refer to the invoice.

Dep. 5-30-57 page 178 } Q. Look at it and you will find it is true.

A. Invoice is dated August 15, 1955.

Q. What is—

Mr. Kellam: I would like the record to show that the statement made by counsel to the effect that the invoice was made prior to July 1, 1955 is not correct.

By Mr. Fine:

Q. The giving of the bond was given before or after the contract was made, do you know?

Mr. Garrett: What's that?

Mr. Fine:

Q. Was the performance bond from Higgerson Brothers given to T. E. Richter before this contract was made, do you know?

A. According to the invoice, the bond was written August 12, 1955. I did not know when, if, or ever it was given to T. E. Ritter Corporation.

Q. Because the date of August 12, 1955 is subsequent to the execution of this contract?

A. I don't know.

Q. Then they never did have the job so far as giving this job to Enlow and Sons is concerned? They had to give a performance bond in accordance with "Exhibit No. 1," isn't that correct?

A. Mr. Fine, I don't know the legal technicalities of whether they had the job or not. The invoice speaks for itself and the date on the contract and anything would be my interpretation and I am not a legal man.

H. Leon Hodges.

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Q. The award that was given from T. E. Ritter to Higgerson Brothers was on what date, do you know?

A. No, sir. Have to refer to the contract.

Q. Do you have an interest in Higgerson Brothers?

A. No, sir; never have had any interest.

Q. But you did turn this over to your brother for handling, didn't you?

A. Mr. Fine, I *aksed* my brother to go see Mr. Kellam with me because I wanted Mr. Kellam to know that part of the credit to bring the client to his office was on account of my brother.

Q. Your brother is one of the counsels in this case and your brother is associated with Mr. Richard Kellam?

A. Yes, sir.

Q. Thank you very much.

By Mr. Campbell:

Q. Mr. Hodges, do you know whether or not a license to do this particular job was ever issued to Higgerson-Enlow or was it not done on Higgersons' license?

A. I know what Mr. Enlow told me. When you refer to a "license," let me understand what you mean. Do you mean as to the contractor's license? Do you mean local city contractor's license?

Q. Both.

A. I do not know.

Q. One inquiry made by Mr. Fine and the answer from you is not clear to me. It is with reference to the insurance premiums. I understood you to say that the premiums charged on liability insurance was related to the payroll of the job. You didn't mean to say that, did you?

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A. May I examine my computations? The premiums for the bodily injury and property damage liability is based on the payroll.

Q. That is something new to me.

A. I submit this to you for examination which would be the basis on which I made my computation.

Q. That's all.

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Mr. Kellam: I wish to call attention to the fact that in the record of the testimony taken on May 30th, the court reporter, Mrs. Kottal, has referred to Mr. Ritter as Mr. Richter. Will counsel stipulate it should have been Ritter, without having to go back and *chanaging* the name through the entire record?

The Commissioner: Let the record show it is so stipulated by agreement of all counsel.

Mr. Fine: I understand plaintiffs have not rested.

Mr. Kellam: It is our understanding we had rested, except to put on any rebuttal testimony, if we find it necessary.

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L. HAROLD HIGGERSON,
one of the plaintiffs, having been previously sworn and examined, was recalled as an adverse witness, and testified as follows:

DIRECT EXAMINATION. (adverse)

By Mr. Fine:

Q. You are Mr. L. Harold Higgerson?
A. Yes, sir.
Q. You have previously testified, on May 30th?
A. Yes.
Q. In connection with this hearing?
A. Yes, sir.
Q. You testified that you had a memorandum and estimate of how you figured this job?
A. Yes.
Dep. 9-10-57 page 6 }
Q. Did you deliver the original estimate to counsel to deliver to us?
A. Yes.
Q. You delivered him the original?
A. Yes.
Q. Is this your original or a copy?
A. Original.
Q. This is the original?
A. Yes.

L. Harold Higgerson.

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Q. I take it you figured this on May 17, 1955?
A. If it is the date on it, I did.
Q. Is that the date you made it?
A. It evidently must have been.

Mr. Garrett: May it be understood that our objection to this examination goes to the entire examination without repetition?
Mr. Fine: I presume you can say that.
Mr. Garrett: Is it agreed that the objection can stand to all questions along this line without being repeated?
Mr. Fine: If the record indicates you make an objection to the entire examination, to which we don't agree.

By Mr. Fine:
Q. So you said "evidently must have been"?
A. Yes.

Dep.
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page 8 } Mr. Garrett: What was Mr. Fine's statement?

(The statement was read as follows):

"If the record indicates you make an objection to the entire examination, to which we don't agree."

Mr. Kellam: Can't we have a stipulation that the objections may not have to be repeated?
Mr. Fine: With the understanding that you are making these objections throughout the entire testimony?
Mr. Garrett: Concerning the relevancy of any questions pertaining to estimates which he has said he has made. We do agree it is not necessary for me to repeat the objection to each question?
Mr. Fine: Yes.

L. Harold Higgerson.

By Mr. Fine:

Q. Did I understand you to say you don't know whether you made it on May 17th or you did?

A. If it is the date I have on the paper.

Q. Is that the estimate (handing paper to witness)?

A. It must be.

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Q. Did you show that to Mr. Enlow?

A. No.

Q. And you didn't show it to Mr. Kesser or Mr. Emanuelson?

A. No, sir.

Q. According to your figures you had a profit on that job of how much?

A. I will have to add all of the items up. I would have to add all the lineal feet of pipe up.

Q. After I get through I will get you to add them up. You did have a profit on the job?

A. Yes.

Q. Is this your handwriting?

A. Yes.

Q. Every bit of it?

A. Yes, sir.

Q. You have on that an estimate of equipment rentals; is that correct?

A. Yes, sir.

Q. Did you check the rental of that equipment with the A. D. rates?

A. No, sir.

Q. Where did you get the figures about what equipment rents for?

A. It depends upon what kind of equipment you put on the job and how it works.

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Q. I take it your estimate was not accurate but just about what it would cost?

A. I figured that was a fair price for use of the equipment on the job.

Q. You had nothing to go by in making the figure?

A. I didn't use the book to go by.

Q. The book publishes the fair rates, doesn't it? Is that correct?

A. It depends upon the type of work. I know of equipment I can rent for half or two-thirds of what the book calls for.

Q. That is rates used, isn't it, the book?

A. That is what a lot go by.

Q. You didn't go by it?

L. Harold Higgerson.

A. No.
Q. There is no question about the fact you had to have a well point system?
A. Yes.
Q. I take it you had equipment rental on here of $2,500.00; is that right?
A. I would have to look at it.
Q. Look at it (handing paper to witness).
A. It is twenty-five plus.
Q. Twenty-five plus?
Dep. A. Yes.
9-10-57 Q. How many pieces is that supposed to be for
page 11 } $2,500.00?
A. I didn't say for $2,500.00.
Q. $1,500.00 and $1,000.00. That is $2,500.00, isn't it?
A. Yes. I had it all down the line.
Q. Is that all you figured the equipment for, $2,500.00?
A. Had a truck in there.
Q. How much was that?
A. $100.00 a month, and miscellaneous.
Q. How much did you have for miscellaneous?
A. $200.00.
Q. What is the total of equipment rental and miscellaneous?
A. $3,450.00.
Q. $3,450.00?
A. Yes.
Q. Was that to take care of the entire job?
A. One month.
Q. How many months did you figure the use of it?
A. I got it broke down into days.
Q. How many days did you figure?
A. I got eighty some working days.
Q. Will you refer to it and tell us exactly how many days you had it worked out instead of some of them?
Dep. A. 76 days.
9-10-57 Q. What is that, sir?
page 12 } A. 76 days.
Q. 76 days?
A. Yes.
Q. So $3,450.00 was for a month?
A. Yes.
Q. For work days?
A. Yes.
Q. How many work days in a month?
A. 20 days.

L. Harold Higgerson.

Q. Your total equipment rental is four times $3,450.00?
A. And that is for equipment, gas and fuel.
Q. That is a small amount, fuel?
A. $650.00, about $2,600.00.
Q. 3450 times 4 is $13,800.00?
A. That is right.
Q. How much did you tell Enlow & Son and Mr. Emanuelson and Mr. Kesser profit you would have in the job?
A. I didn't tell them.
Q. You mean to say when you talked with them you didn't tell them how much profit you had?
A. No, I didn't tell them nothing. If I am going to sub it out, why should I?

Dep. 9-10-57 page 13

Q. You work on a profit basis?
A. I subbed it.
Q. You did better than that. You were going to share in the profit?
A. I was guaranteed a profit.

Q. Over and above that you were going to share in it?
A. I was supposed to get $3,000.00 regardless. If the job made $6,000.00 and over I got it. If it made $8,000.00 I got $6,000.00, if it made $15,000.00 I got $6,000.00, and if it didn't make anything I was to get $3,000.00.
Q. What about the equipment that was used, didn't you pay for the equipment?
A. No.
Q. Didn't you write a check to Mr. Enlow for some equipment as a part of the job?
A. I don't know whether he got any, or not. There were some bills paid.

Mr. Garrett: I hate to interrupt, but every bit of this has been gone over in previous testimony. It is all in the record.
The Commissioner: I think it is in the record.
Mr. Garrett: I read the transcript no later than last night.

By Mr. Fine:
Q. Referring to the contract itself, as I take it you notice an item about equipment?

Dep. 9-10-57 page 14

A. Let me see.
Q. Any other item agreed upon?
A. I didn't agree upon no other item.
Q. You did not?
A. No.

L. Harold Higgerson.

Q. Did you know that they had equipment?

A. I didn't know what they had. There are plenty of equipment dealers. They can get it any place.

Q. When they took the job they had no equipment and you paid for equipment while it was being rented, as testified by Mr. Hodges?

A. I believe there was some bills paid for equipment.

Q. Did you pay bills for equipment which totalled $5,491.40 through—to May 11, 1956?

A. I suppose so.

Q. Your records indicate it was not charged up to them?

A. It was charged to the job.

Q. Actually charged to the job?

A. They were supposed to pay all expenses.

Q. When a bill was sent to you for rental of equipment do you recollect having a conversation with Mr. Enlow?

A. I don't recollect.

Q. I will give you the conversation first. Do you recollect telling Mr. Enlow, "I am awfully tied up for money. I can't hardly make the payroll," and asked him to defer the rental equipment "until we get through"?

Dep.
9-10-57
page 15 } Mr. Kellam: I think he is entitled to know when it took place and where.

Mr. Fine: He says he doesn't recollect.

By Mr. Fine:

Q. Do you want to know the time and place, or do you remember making a statement like that?

A. I don't recall.

Q. Your contract was with T. E. Ritter?

A. Yes.

Q. What was your contract with them for?

A. To install pipe.

Mr. Kellam: We object to that. The contract is in evidence and speaks for itself. The contract between him and Ritter speaks for itself.

Mr. Garrett: Mr. Fine is just wandering through the same matter.

The Commissioner: That seems patent to me. This contract is a complete contract, and is a contract between Ritter

and the State Highway Department. It is marked Defendant's Exhibit 1.

Mr. Kellam: That is correct.

Dep. 9-10-57 page 16

By Mr. Fine:

Q. Is there a total on that contract?

A. No, there is not.

Q. How much was it?

A. I think the original was about eighty-five or ninety; I don't recall. We had bid on unit prices.

Q. Eighty-five or ninety-thousand dollars?

A. Yes.

Q. You have the contract that has been introduced. My friends say it speaks for itself, but you can't tell how much it is?

A. Not until I total up the footage.

Q. I will get you to do that afterwards.

A. All right.

Q. You said you figured it was 80 days, four months at 20 work days?

A. 120 calendar days.

Q. You didn't figure your equipment on the basis of 80 days?

A. I figured—what I have got down there is rental, 30 day months, calendar days.

Q. The job you had with T. E. Ritter, was that all of the job you gave to Enlow & Son or did you have other work on the job?

A. When I bid on the job, what I originally bid was the pipe work. Mr. Enlow said he wanted drop inlets and manholes and we agreed with Ritter we would do the entire contract at the same price he bid it for, that work.

Dep. 9-10-57 page 17

Q. There were two portions of the contract?

A. It was included on this. He said he wanted it to go with the pipe.

Q. When Enlow & Son didn't finish the job, what remained to be done to finish it?

A. It was drop inlets and manholes and cutting some pipe.

Q. That is all?

A. As far as I know.

Q. As far as they were concerned, someone had to do some concrete work for it to be completed?

A. Yes.

Q. Who did that?

L. Harold Higgerson.

A. Carter and Correll.

Q. That was not a part of their job to do under the contract?

A. No. It was a part of the job to do under this contract which was not finished.

Q. They had to do the manholes?

Mr. Garrett: Who is "they"?

Mr. Fine: Enlow & Son.

By Mr. Fine:

Dep. 9-10-57 page 18

Q. They had to do the manholes?

A. Yes, and inlets.

Q. At that time they could not have done it because they were waiting for the concrete to be poured; is that correct?

A. At one time.

Q. The last time they said they could not go any further because the concrete work had to be done by another sub-contractor?

A. The paving had to be done but some sections could have been completed.

Q. They had to wait for the paving to be done before they could finish the job; is that correct?

A. Yes.

Q. How long a delay was there on account of that?

A. I couldn't tell you.

Q. Don't you know you have charged for that delay, and you can't tell how long the other sub-contractor delayed it?

A. The delay was charged to me.

Q. You in turn charged it to them in accordance with the settlement you made with the State Highway Commission?

A. I didn't have no contract with the State Highway Department and didn't make any settlement with them.

Q. Did you make any settlement with Mr. Ritter?

A. Yes.

Dep. 9-10-57 page 19

Q. How many days did you charge for?

A. I don't know. I would have to see the letter.

Q. Your accountant has testified that that settlement was made without consulting Enlow & Son.

Mr. Kellam: I object to the form of the question. There is no testimony that any settlement was made. All the evidence is that Ritter had made certain deductions which were improper, and there has been no settlement with Ritter.

L. Harold Higgerson.

By Mr. Fine:
Q. You want this Court to believe that you just wanted Enlow & Son to do this job without your telling them how much profit was in it?

Mr. Garrett: We object to that. That is not proper, what he wants somebody to believe. It is not properly phrased. He can ask the witness questions, but that is not a proper question.

By Mr. Fine:
Q. Do you still stick to your answer that you didn't tell them how much profit was in the job?
A. I didn't tell them.
Q. Did you tell them you were going to lose money?
A. No.

Dep. 9-10-57 page 20 } Mr. Garrett: He has been over all of this by the hour.
Mr. Fine: The record will indicate what I am asking is entirely proper. I read the record no longer than last night.

By Mr. Fine:
Q. Did you ever tell them you were going to lose money on the job?
A. No.
Q. It was a recorded contract?
A. Show it to me.
Q. Is that right?

Mr. Kellam: I object to that. It is a statement and not a question.
Mr. Garrett: It has been covered four or five times.
Mr. Fine: We have pleaded misrepresentation and that is what we are showing.

By Mr. Fine:
Q. I ask you whether or not you made the statement that you were going to supervise this job?
A. No.
Q. Did you go out on the job any?
A. Yes, I went out there to see how it was getting along.

R. L. Edmondson.

Q. How many times did you do that?
Dep. A. About once a week.
9-10-57 Q. Are you sure you did go once a week?
page 21 } A. Yes.
Q. Why did you do that? That is not consistent, is it?

A. When we are bound by a contract by bond we are responsible and I wanted to see how it was getting along.

Q. What instructions did you give on the job?

A. Not any. I asked them to speed it up.

Q. How many hours a week have you spent on the job?

A. I don't imagine over an hour a week.

Q. Did you ever make any suggestion to Mr. Enlow about it?

A. I asked him if he could do something to speed it up.

Q. That took an hour a week?

A. I would ride over the job.

Q. You stayed there an hour?

A. From the time I got there until I left, it would be about an hour. Sometimes nobody was on the job.

Q. You could not supervise a job if nobody was on it?

Mr. Garrett: He didn't say he supervised it.

Mr. Fine: I submit he did. The record will bear me out. That is all.

And further this deponent saith not.

Dep.
9-10-57
page 22 } R. L. EDMONDSON,

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:

Q. You are Mr. R. L. Edmondson?

A. That is correct.

Q. Mr. Edmondson, won't you state your age, residence and occupation?

A. Thirty years old, I live at 202 Monitor Road, Portsmouth, construction inspector, Virginia Department of Highways.

R. L. Edmondson.

Q. How long have you been connected with the Highway Department?

A. Approximately ten years.

Q. It was a part of your duty to inspect this job?

A. That is correct.

Q. In connection with this particular job you saw Mr. Higgerson on the job, didn't you, occasionally?

A. What do you mean by "occasionally"?

Q. Did you see him on the job?

A. Yes.

Dep. 9-10-57 page 23 } Q. How often did you see him on the job?

A. From my best memory, I don't remember seeing him over three or four times.

Q. What was he doing on the job when you saw him?

A. A few times I remember seeing him there more or less standing around watching.

Q. I refer you to the last date that Enlow & Son were on the job and when they left the job. Will you tell the Court substantially what remained to be done at that time?

A. Substantially and generally speaking, the only thing I know they were supposed to do was to complete the drop inlets, and at that time there was a question about the lines, cleaning them out. That is work that could not be done at that time.

Q. Their work could not be done at that time; is that right?

A. Yes. As far as finishing the drop inlets, we had to wait on the pavement.

Q. Who was doing the paving?

A. T. E. Ritter.

Q. How much time elapsed before T. E. Ritter began the pavement?

A. Approximately two months before they began.

By Mr. Kellam:

Q. Two months from when?

A. About the time they left. That is the approximate date.

Dep. 9-10-57 page 24 } By Mr. Fine:

Q. Your records would indicate, would they not, when T. E. Ritter—

M. L. Welch.

A. My records would indicate when the paving began.

Mr. Kellam: We call for the records.
Mr. Fine: We are going to produce them, and you may be sure of that.
Mr. Kellam: We call for them and not what the witness says.
Mr. Fine: We will have them.

By Mr. Fine:
Q. Do you have those field notes in your record now?
A. I have some.
Q. I will ask you, when you finish here, to bring them up to determine whether it was two months and 59 days. Check your official records made in the field.
A. Me or my assistants?
Q. They were made under your supervision?
A. Yes.
Q. I will ask you if you will check those up and after these gentlemen question you, as far as I am concerned you may be excused. They might want to ask you a few questions.

Mr. Kellam: We have no questions of the witness at this time.
The Commissioner: All right.

Dep.
9-10-57
page 25 } And further this deponent saith not.

M. L. WELCH,
called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:
Q. You are Mr. M. L. Welch?
A. Yes.
Q. Would you state your age, residence and occupation?
A. 33 years old, I live at 1440 Modoc Avenue. Norfolk, Virginia, and I am in the contracting business.
Q. How long have you been in the contracting business altogether in your life?
A. I have been in business for myself since about 1949.

M. L. Welch.

Q. Prior to that what functions did you have with that business?

Dep. 9-10-57 page 26

A. I have followed the construction business ever since I was big enough to do anything in it.

Q. Are you familiar with cranes?

A. That is my biggest rental business, crane service.

Q. How long have you been in that particular line?

A. Approximately five years.

Q. I will ask you if rental equipment is based on the fair market value as prescribed by the association?

A. I would say in general it is, yes. Unless there is some other prior agreement made, I think that is the general trend. I know I do on equipment I rent. We base our figures on the A. D. rental book, and its condition.

Q. I refer you to the period of July 15, 1955, to March 15, 1956, and ask you what is the fair rental value of a 90 link belt speeder one yard crane and one yard bucket? What would that rent for?

Mr. Garrett: I want to enter an objection to this testimony or any other of like purport on the grounds it is not material or relevant to the contract entered into by the parties in this cause, and without repetition can it be understood it is a continuing objection?

Mr. Fine: All right.

By Mr. Fine:

Q. I ask you to state what that would be?

Dep. 9-10-57 page 27

A. The rental?

Q. Yes.

A. The only answer I could give you on that, if I was to quote a man at this time without any other agreement I would refer to the A. D. book.

Q. How much would that be a month?

A. How was it run, as a dragline or excavator?

Q. Dragline.

A. In 1955 the book shows, A. D. book, $1,332.00 a month.

Q. With a one yard bucket how much would that be?

A. Dragline bucket?

Q. Yes.

A. It shows $116.00 a month.

Q. What if the bill shows $1,300.00 a month? That is below the A. D. rates?

A. Yes.

M. L. Welch.

Q. Which is $1,332.00?

A. Yes, it is below the A. D. rates. I would like to make myself clear. Unless some prior agreement was made, if I was quoting a price now that is what I would quote, the A. D. rates. It depends upon the final agreement you make.

Q. Regarding one four inch centrifugal pump what is it?

A. I can't give you what that is because I never rented any pumps. I never knew what they were used for other than to shoot water out of a hole. What is it?

Dep. 9-10-57 page 28 } Q. Four inch centrifugal pump, c-e-n-t-r-i-f-u-g-a-l, it is spelled.

A. It is probably a 30 to 40 M. I think that may mean gallons.

Q. I refer you to one No. 105 Worthington air compressor. How much would that be per month?

A. Is that gasoline or diesel?

A Voice: Gasoline.

The Witness: What is the size?

By Mr. Fine:

Q. 105.

A. The books rate it at $85.00 to $125.00 and $198.00 a month.

Q. I refer you to one three inch mud hod pump.

A. I believe that would come under a diaphragm. It doesn't have any rate set up for mud hod pump. What size is it?

Q. Three inch.

A. Single or double?

Q. Single.

A. A three inch one rates at $58.00 a month.

Q. Now, trailer mounted Pacific pump for jetting well-points.

A. I don't believe you will find a rating in this book for it.

Dep. 9-10-57 page 29 } Q. Can you give us the benefit of your experience as to the fair market value of that?

A. I sure could not because I haven't had any experience with it. I think you would have to deal with the tractor and pump separately.

Q. As to the wellpoint system, what would be a fair rental on that?

A. Are you referring to the entire system or just intending to drive—or just the work of drawing water?

Q. That is a system known as 1 Model 89 D wellpoint

pump, 125 Griffin wellpoints, 25 rubber swing joints, 6-6″ by 90 degree elbows.

A. I don't believe you can pick that out of this book.

Q. You cannot?

A. No. It gives you the wellpoint accessories, but you would have to specify the name.

Q. Can you refer to Model 89 D?

A. This doesn't give you the make. This book doesn't give you any trade name.

Q. Can you give us the benefit of your experience about what that would be?

A. No, because I haven't had any experience at all in that field.

Mr. Fine: Your witness.

Mr. Garrett: No questions.

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9-10-57
page 30 }

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R. L. EDMONDSON,

a witness herein, having been previously sworn and examined, was recalled for further examination and testified as follows:

Dep.
9-10-57
page 31 } DIRECT EXAMINATION.

By Mr. Fine:

Q. We have just asked you to look at your field notes in connection with the time that elapsed before the paving was done and when the job commenced again. Will you refer to your records and tell us?

A. The last pipe work Mr. Enlow put in was March 30, 1956.

Q. When was the paving commenced?

A. On Saturday, June 23, 1956.

Q. When was it completed, when was the paving completed?

A. I would have to check the last figure.

R. L. Edmondson.

Q. I will change the question. When was the paving completed so that the rest of the job could have been done? As I understand it, to make myself clear, there was a time period between March 30th and June 23rd before any paving was commenced. Assuming your records indicate they started paving on June 23rd, when could the manholes have been done?

A. I would say if it was started somewhere around July 1st they could have started and progressively kept up as the paving progressed.

Q. All of April, May and June elapsed then before the work could have commenced?

A. Yes.

Dep.
9-10-57
page 32 } Mr. Fine: All right, sir.

And further this deponent saith not.

Mr. Kellam: Mr. Commissioner, may we call your attention to the transcript of testimony taken May 30th? On Page 114, in referring to a bill of T. E. Ritter, it refers to an item of $1,656.00 which has to do with 42-inch pipe and a deduction of $200.00 per foot for 42-inch pipe laid by the Vanguard Construction Company, when the price charged was two dollars. With your permission I will write over that in pencil that it is two dollars.

Mr. Fine: Were you looking at the total?

Mr. Kellam: Yes. Here is the bill showing the total.

Mr. Fine: We are not worried about how much per foot it was.

Dep.
9-10-57
page 33 } May it please the Court, I want to introduce at this time the estimate that is purported to have been in the writing of Mr. Higgerson, and I would like for you to mark that as Enlow's Exhibit 1.

Mr. Garrett: We object to its admission on the grounds it is neither material nor relevant to the issues in this case.

The Commissioner: It will be received and marked "Enlow's Exhibit 1."

Your objection is noted, Mr. Garrett.

Mr. Fine: Responding to the objection, I would like to state that it is material, competent and relevant in explanation of the contract made between the parties, particularly as to Item 3. I would like to point out in Item 3—

Herman A. Enlow.

Mr. Garrett: Are you going to argue the case?

Mr. Fine: These are the words in there: "And any other item agreed upon."

Dep.
9-10-57
page 34 } HERMAN A. ENLOW,

one of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:

Q. Please state your name, age and residence.

A. Age 52, residence Oak Grove, Norfolk, Route 3, Box 101-A.

Q. On July 1, 1955, you were president of Enlow & Son, Incorporated; is that correct?

A. That is correct, yes, sir.

Q. For how long a period of time had you all been incorporated on July 1, 1955?

A. Approximately, I would say, the best I recollect, May 30th we went in the corporation.

Q. 1955?

A. Yes, sir.

Q. When you entered into this agreement as president of Enlow & Son, Incorporated, you were not a certified contractor as provided by the Code of Virginia?

A. No, I was not.

Q. Did you give that information to Higgerson Brothers?

A. Yes, I certainly did.

Dep.
9-10-57
page 35 } Q. Will you also state whether or not T. E. Ritter Corporation, the general contractor who awarded the job to Higgerson Brothers, was also apprised of the fact that you were not—

A. Yes, he was.

Q. —a certified contractor?

A. Yes, sir.

Q. In spite of that did Higgerson Brothers make the agreement of July 1, 1955, with you?

A. Yes, sir.

Q. Now, will you tell the Court your first conversation with Mr. Higgerson or Higgerson Brothers in connection with the contract?

A. My first conversation with Mr. Higgerson was approximately four weeks, three to four weeks, before we entered into

the contract. I called Mr. Higgerson at his residence at night. I was told he had a pipe job, to get some put in.

Mr. Garrett: We object to that as hearsay.

A. (Continuing) He told me he had the job and I met him the next morning across the road in front of my house at a service station, and he gave me the quantities and asked me to figure a price, which I did, and two or three days later he told me he had the job and the money he had in it, and then he asked me if I would be interested in doing the job there with T. E. Ritter Corporation and I told him I would, but we were not certified.

Dep. 9-10-57 page 36

We went over on the Military Highway the following day and talked to Harold Ritter, Jr., and I told him at the time we were not certified but I felt like we could do the work.

He told me he wouldn't accept us on the contract for the reason we were not certified and the job would run over $20,000.00.

It rocked on for two or three weeks, and Mr. Higgerson came back by to see me and asked me if I would be interested in taking the job at that time, and what he had in it, and he showed me his figures per unit price per foot. In the meantime we had gone into the corporation.

By Mr. Fine:

Q. Regarding the price he had in it, I refer you to Defendant's Enlow Exhibit 1 and ask you if that is the memorandum he showed you?

A. No, that is not the memorandum he showed me.

Q. Will you assign your reason for saying that is not the memorandum?

A. The memorandum he showed me was working but a plan, a sheet of yellow paper and at the end of it it had the lineal feet of pipe, 42-inch pipe at so much per foot, so many feet of 36-inch pipe at so much per foot, and so many feet of 30-inch pipe at so much per foot, and he told me that was what he had in the contract with T. E. Ritter Company.

Dep. 9-10-57 page 37

Q. Continue.

A. I told him then I would have to take it up with the corporation, which I did. I don't remember the exact amount of time that elapsed, but some two or three

days after that we went in Mr. Kesser's office, and Mr. Higgerson and myself went in the contract.

Q. Was anybody else present besides you, Mr. Kesser and Mr. Higgerson?

A. Mr. Emanuelson.

Q. When you say "Mr. Higgerson," will you identify which Mr. Higgerson?

A. Mr. L. H. Higgerson, sitting over here.

Q. Continue.

A. That is the way the contract started.

Q. What, if anything, was said with regard to the rental equipment?

A. It was discussed up one side and down the other. Mr. Higgerson said—

Mr. Kellam: We object to the question and answer on the grounds it is an attempt to vary the written contract.

Mr. Fine: To the contrary, it is not. It provides for any other items agreed upon.

Mr. Kellam: And on the additional grounds that it is merged into the contract.

Dep.
9-10-57
page 38 } A. (Continuing) Mr. Higgerson began at the time discussing we didn't have the equipment and we would have to rent equipment to start the job, and we would eventually get our own equipment, and it was agreed upon to open a joint account of Enlow-Higgerson in the National Bank of Commerce.

By Mr. Fine:

Q. Who was to pay for the equipment?

Mr. Kellam: I object to the question.

Mr. Garrett: On the grounds that the contract provides for that.

By Mr. Fine:

Q. Go ahead.

A. Mr. Higgerson agreed to go on with the job and pay all bills.

Mr. Garrett: We object to that on the grounds it is an attempt to vary the written contract.

Herman A. Enlow.

Mr. Kellam: And the contract speaks for itself.

By Mr. Fine:

Q. Continue.

A. Equipment was discussed and it was agreed that I would rent a crane and go ahead, and I rented it from the Norfolk Contracting Company, a three-quarter yard machine, 22 beam.

Dep. 9-10-57 page 39

Q. Who paid for that equipment?

A. It was paid for by check signed by Enlow and Higgerson out of the joint account.

Q. Who signed the check?

A. Mr. Higgerson and myself.

Q. And that item of over $5,000.00 in the record is correct?

A. That is correct.

Q. All right. What did Enlow & Son do about the equipment?

A. We bought a crane, a one yard crane from Hunter Scott. It was bought from Richmond, and the equipment come out of Richmond, and Hunter Scott moved it.

Q. You bought equipment?

A. Yes.

Q. Who was to pay for the rental of that?

A. The rental was to be paid each month.

Q. By whom?

A. Enlow-Higgerson out of the joint account.

Q. As a matter of fact, how did the corporation arrange to buy this equipment?

A. We went to the National Bank of Commerce and borrowed $20,000.00 with the understanding that we would pay back the rentals on it each month.

Dep. 9-10-57 page 40

Q. Did you take up the matter of the rental of the equipment with Mr. Higgerson?

A. At the end of the first month I made up a bill and carried it to Mr. Leon Hodges who was doing book work for us.

Q. What was said?

Mr. Kellam: I object to what Mr. Hodges said. He is not a party to the proceedings.

Mr. Fine: He is bookkeeper and has testified fully, and is acquainted with all of this work.

The Commissioner: Objection noted.

Herman A. Enlow.

A. When I presented the bill to Mr. Hodges Mr. Higgerson was not there and he had to come in and sign the check. He asked us if I would take it up with my corporation and let it go over, which I did, and it was agreed we would go along with him.

By Mr. Fine:

Q. When was he to pay for that equipment?

A. When the job was completed.

Q. Did Mr. Higgerson ever deny that he would pay for the equipment out of this account?

A. No, he didn't to me.

Q. When you bought this equipment which you say you paid $20,000.00 for, who was buying the equipment?

Dep. 9-10-57 page 41

A. Enlow & Son, Incorporated, was buying the equipment.

Q. Was that to be rented to—

A. To Enlow-Higgerson for this specific job, that is correct.

Q. I hand you herewith Plaintiff's Exhibit 9 and ask you if this is the bill of $23,315.00 for the rental of all equipment on the job with Enlow & Son, Incorporated?

A. That was up until March, sir.

Q. July 15, 1955, May 15, 1956, bill dated March 15, 1957?

A. That is correct.

Q. Did he deny owing this bill, Mr. Higgerson, to you at any time?

A. He didn't deny it to me, no.

Q. Are the rates charged fair and reasonable rental?

A. I think so, yes.

Q. When you say you think so, let me ask you about your experience. How much experience have you had in connection with rental of equipment and the fair value of equipment of that kind?

A. I have been in the construction business 36 years, have had Government contracts and we usually use the A. D. rental book as to whether it is based on new or secondhand equipment, etc.

Dep. 9-10-57 page 42

Q. When you speak of buying certain equipment for $20,000.00, you don't mean you bought all of this equipment but some of the equipment?

A. We bought some of it. To be specific, the $20,000.00 was for the crane, wellpoint system and pump.

Q. What representations, if any, were made to you about

how much money Mr. Higgerson had in this job, made to you and the other defendant?

Mr. Garrett: We want to object to that as immaterial, irrelevant, and an attempt to vary the terms of a written contract drafted by the attorney for the defendants.

A. The day we went into this contract it was discussed as to the amount of profit he thought was in the job. He told us that day he figured approximately $20,000.00, and during the conversation I disagreed with him on that amount of profit in the job. I told him I thought there was a possibility of about $12,000.00.

By Mr. Fine:
Q. What else was said by him with regard to profit, if anything?
A. I don't remember anything else discussed in regard to profit, only he went into detail as to what he would do, it would be a bonded job and financed, and he would make the payrolls, and it was discussed that if the job made $12,000.00 he was to get six, and if it didn't make any money he was to get $3,000.00 anyway.
Q. Why did the corporation agree to the $3,000.00?

Dep.
9-10-57
page 43 } Mr. Kellam: It is understood that our objection goes to this entire line without the necessity of interrupting each time by objecting?
Mr. Fine: All right.
Mr. Garrett: On the grounds that the written contract merged all prior statements and agreements.
The Commissioner: All right.

A. The question was brought up something in regard to liability insurance, and I believe Mr. Kesser suggested that they go further. He had asked for a certain per cent, 3%, something like that, and Mr. Kesser suggested he would even go further, that he would be guaranteed $3,000.00 in any eventuality, whether the job made money or didn't.

By Mr. Fine:
Q. Did Mr. Kesser and Mr. Emanuelson guarantee that personally as to insurance?

Herman A. Enlow.

A. As to insurance, yes.

Q. On the basis of his getting $3,000.00 in any eventuality, was that agreed upon because you were to get rental equipment on the job?

Mr. Garrett: We object to that as leading. He is testifying, not the witness.

Dep. 9-10-57 page 44 } By Mr. Fine:

Q. What was the reason for it, for the $3,000.00 he was getting?

A. He was getting it from an insurance standpoint against any claims that might come up and in any eventuality the corporation guaranteed him $3,000.00.

Q. Why did the corporation agree to that?

A. To protect him.

Q. Was the corporation going to make anything out of rental of the equipment?

A. The corporation was to receive equipment rental each month. That is the usual procedure. If you put equipment on a job you usually have to pay it in advance. If I call Mr. Welch to furnish equpiment, every month they usually require it in advance.

Q. Referring to the contract itself, state whether or not the parties, Mr. L. Harold Higgerson and Ivan Higgerson, lived up to the agreement?

A. No, they did not.

Mr. Garrett: We object to a conclusion and move to strike it out.

By Mr. Fine:

Q. Why do you say that?

A. In the first place, they agreed to make the payrolls under any circumstances and we were forced to make the payrolls.

Dep. 9-10-57 page 45 }

Q. State whether or not they obtained discounts?

A. In the majority of bills, yes.

Q. Did they pay it on all bills?

A. No.

Q. Why didn't they?

A. Because some were never paid.

Q. Who was to guarantee them?

A. Enlow-Higgerson.

Q. Who was to put the money in for that?

A. Mr. Higgerson.

Herman A. Enlow.

Q. Did he run shy of money?
A. I don't know, but the bills were not paid. A man was at my house last week wanting to collect, and he told me—

Mr. Kellam: We object to what somebody told him.

By Mr. Fine:
Q. Don't go into that unless it was Mr. Hodges.
A. It was not Mr. Hodges.
Q. State whether or not Higgerson Brothers or Mr. Harold Higgerson told you they were not going to put any money in bank?
A. That they were not, yes.

Mr. Kellam: We object to leading the witness.

Dep. 9-10-57 page 46 } By Mr. Fine:
Q. What did Mr. Higgerson say to you about the payroll?
A. That come up at a later date when he called me and asked me if we were going to complete the job and I asked him if he was going to make the payroll and he told me he was not.
Q. Was that the time mentioned, on March 30th?
A. At a later date.
Q. That was after the paving had been done?
A. Yes.
Q. And he refused to put any more money in for the payrolls?
A. Yes.
Q. What did you say to him?
A. I told him we could not complete the job unless he was going to make the payrolls, and he wrote the corporation a letter, I believe, and sent me a copy and Mr. Kesser and Mr. Emanuelson a copy.
Q. Would you, or not, have completed the job if he had paid the payrolls?
A. Yes, we would have been willing to go back and complete it.

By the Commissioner:
Q. What did you say about if he had made the payrolls, you would have been willing to do what?

Herman A. Enlow.

A. If he had told me he would make the payrolls I would have been willing to go back and complete it, and when he told me he would not Enlow & Son was not financially able to.

Dep. 9-10-57 page 47 } Q. When was that?

A. Some time along in June, about the middle of June.

Q. What year?

A. 1956.

By Mr. Fine:

Q. With regard to Mr. Higgerson, what was he to do with regard to the job?

Mr. Garrett: We, of course, don't want it to be thought that we are agreeing to this testimony, that this is a written contract, and if it is understood it goes to each and every question that purports to state what an agreement was in conflict with the contract, we want to repeat our objection which I understand is necessary to be done under the rule of procedure unless it is agreed that it goes to all of this line.

Mr. Kellam: You agree it goes to each question?

Mr. Fine: We don't agree that we are varying the contract, but agree that you make objection to each question.

By Mr. Fine:

Q. What was he doing on the job with regard to supervision, if anything?

Dep. 9-10-57 page 48 } A. He agreed according to the terms of the contract, bond it, finance it, take care of the insurances and supervise it. He was to supervise the job or help supervise it.

Q. How much time was he supposed to spend on the job?

A. No set time on it.

Q. Did he supervise the job?

A. No. If he did it would be after I left the job or my employees left the job.

Q. How many times was he on the job? Was he there once a week?

A. Not to my knowledge, no.

Q. How often did he go on the job?

A. I remember seeing Mr. Higgerson over there four or five times maybe. He would come by and stop his automobile. I have seen him drive up the street several times and

Herman A. Enlow.

didn't stop. As to Higgerson coming on the job and staying any length of time, he didn't.

Q. Did he stay there as much as an hour at the time?

A. Not on the job where work was going on. He may have driven over the job, but he didn't stay where the work was in progress.

Q. You said Enlow & Son would have been perfectly willing to do the job if he had made the payrolls. Would you, or not, been perfectly willing to have stayed on the job if he had taken care of the payrolls and discounts?

Dep. 9-10-57 page 49

A. Yes, I think so.

Q. When was the first time he failed to make the payroll, Mr. Enlow?

A. I would have to go back to the canceled checks of Enlow & Son, Incorporated. I don't remember the exact date. There were several instances he could not make the payroll and we had to lend money to Enlow-Higgerson to make them, and they reimbursed part of it. There is about four-hundred and some dollars that has never been reimbursed.

Q. I ask you if you agree with the testimony given by Mr. Hodges?

A. Yes. Enlow & Son advanced February 24, 1956, $350.00, and April 12, 1956, $250.00.

Q. And December 8, 1955, $846.21?

A. I think that is correct, yes.

Q. Was Enlow & Son able to finance the handling of the payroll, or not?

A. No, we were not able to finance the payroll at all.

Q. Did you know that when you entered into the agreement?

A. Yes, I knew that beyond any shadow of a doubt.

Q. On Page 147 of the record reference is made to items payable of $5,491.47 for the rental of equipment. Did Mr. Higgerson sign checks for the payment of that, or not?

A. Yes.

Dep. 9-10-57 page 50

Q. When did he say he was going to pay you for the use of the equipment?

A. When the job was completed.

Q. The original agreement was what?

A. The first of each month he would pay.

Q. What was the reason he assigned for not paying it the first of each month?

A. He asked me to take it up with the corporation and see if we could wait because he was short of cash at the time.

Herman A. Enlow.

Q. Did he tell you he was short of cash when he entered into the agreement on the first day of July, 1955, or did he tell you he had enough money?

A. I don't believe he mentioned he was short of cash at the time.

Q. Would you have entered in the agreement if you had known he was short of cash?

A. No. I knew we could not finance it.

Q. Did you have anything or your corporation have anything to do with the performance bond on this job with the State Highway Commission?

Mr. Kellam: With what?

Mr. Fine: With the State Highway Commission, did they have anything to do with the performance bond.

Dep. 9-10-57 page 51 } By Mr. Fine:

Q. Did you have anything or did your corporation have anything to do with the performance bond on this job with the State Highway Commission?

A. We did not. The State Highway Commission didn't recognize Enlow & Son.

Q. You were not doing the work as sub-contractor?

A. No.

Mr. Garrett: That is a conclusion and we object to it.

The Commissioner: The objection is noted.

By Mr. Fine:

Q. Referring to your first claim you say that they didn't contribute for a part of the payroll advances. Was that item $350.00?

Mr. Kellam: I object to it. Let him state it.

Mr. Fine: He said before it was $450.00.

A. To the best of my recollection, yes, that is what it would be.

By Mr. Fine:

Q. $350.00 and $100.00, or $450.00?

A. I would have to go to the records.

Herman A. Enlow.

Mr. Kellam: We call for the records as the best evidence.

Dep. 9-10-57 page 52

Mr. Fine: I think your man said they advanced it on three occasions.

Mr. Garrett: Why do you have to ask him if it is in the record?

Mr. Fine: I want it in the record.

The Commissioner: Are you ready to resume, Mr. Fine?

Mr. Fine: Yes, sir.

By Mr. Fine:

Q. I want to ask you one question: Until this litigation was brought in Court, I want you to tell the Court whether or not Higgerson Brothers had ever denied owing to Enlow & Son, Incorporated, the rental on this agreement? Had they ever denied it before they brought this action?

A. Not to me, not to my knowledge.

Mr. Fine: That is all.

CROSS EXAMINATION.

By Mr. Garrett:

Q. Mr. Enlow, you said you never got any denial about any equipment rental. There has been introduced in evidence Plaintiff's Exhibit 10, March 24, 1956. Would you mind looking at that and seeing if that refreshes your memory? Does that refresh your memory?

Dep. 9-10-57 page 53

A. I didn't get a copy of this personally. If it went to the corporation—

Q. You have seen it, Mr. Enlow?

A. I might have seen that bill.

Q. You don't deny that you have seen it, do you?

A. I wouldn't swear I have seen it, no.

Q. And you wouldn't swear that you didn't see it?

A. I wouldn't swear that I didn't see it.

Q. It is addressed to, "Enlow & Son, Inc., c/o Lewis K. Kesser, Adams Building, Norfolk, Virginia." That is the building in which you had the office of the corporation?

A. Yes.

Q. It refers to bill dated March 20, 1956?

A. Yes.

Q. The bill on which you purport to make all of the charges of $23,000.00 was submitted as of March 20, 1956?

A. Yes.

Herman A. Enlow.

Q. Do you have any prior bills submitted?
A. I have one bill for November.
Q. Where is it?
A. At home.
Q. This is the particular bill in which you itemize all of the charges totalling $23,000.00 and is dated March 20, 1956, and it expressly refers to that bill in which you figure the total?
Dep. 9-10-57 page 54 } A. Yes.
Q. Do you not see the letters the corporation gets?
A. I usually do, but there are so many letters coming in I couldn't tell you which one. I might have seen that bill, but at the present time I don't remember discussing it with Mr. Kesser or Mr. Emanuelson.
Q. When you sent the bill you certainly got a response from them, didn't you?
A. I got a response from Mr. Higgerson by telephone.
Q. Did you get a letter from him?
A. If I got a copy of the letter I don't have it in my file.
Q. You would have the original, would you?
A. It would probably be sent to Mr. Kesser.
Q. Do you deny it was sent to the office?
A. No.
Q. It would not have escaped your attention, would it, a $23,000 obligation you claimed due you?
A. That is correct, but there were so many disputes I didn't pay much attention to them.
Q. You were ready to get out?
A. No. I had completed my part of the contract.
Q. What was your position in the corporation?
Dep. 9-10-57 page 55 } A. President.
Q. Did you see all of the communications addressed to the corporation?
A. Part of them.
Q. Were you interested in them?
A. Yes, but at that time the corporation was not doing very much because we were financially embarrassed.
Q. Who were the stockholders?
A. Mr. Kesser and Mr. Emanuelson.
Q. What percentage of stock did they own?
A. 100%.
Q. You know nothing, you were just a Dr. Jekyll and Mr. Hyde?

Herman A. Enlow.

A. I had to know about handling it, and they were going to finance it.

Q. You did know how?

A. Yes.

Q. You entered into negotiations with Mr. Higgerson concerning every contract?

A. No, not the contract.

Q. You had some specific knowledge of the work to be done?

A. Yes.

Q. Thirty-six years experience?

A. Yes.

Dep. 9-10-57 page 56 } Q. You were an experienced contractor and knew the type of work that you were discussing?

A. Yes.

Q. After the conference with Mr. Higgerson you went to the office of Mr. Kesser and Mr. Emanuelson who were stockholders in Enlow Brothers Corporation?

A. Yes.

Q. And after a conference there the written contract was written merging what you had agreed upon?

A. Yes.

Q. What attorneys were present at that time?

A. Mr. Kesser.

Q. He was the only attorney there?

A. Yes.

Q. You discussed it in his office and after a full discussion the agreement was prepared in writing?

A. Yes.

Q. By whom?

A. Mr. Kesser.

Q. Mr. Kesser drew the agreement?

A. Yes. Mr. Higgerson would ask him to change a paragraph. I think he wrote the contract two or three times

Q. Before the final written memorial was prepared there was an interchange—

Mr. Fine: I object to the "memorial."

Dep. 9-10-57 page 57 } By Mr. Garrett:

Q. There was an interchange of thoughts before it was finally put down in writing?

A. Yes.

Q. Was it then and there signed or was it taken up for any further consideration?

Herman A. Enlow.

A. I think it was signed at that time.

Q. You don't have to think about it. Was it signed at that time?

A. I think it was.

Q. Do you think or do you know it?

A. To the best of my recollection, whether we went to the bank or whether it was signed on the date of it, I don't know.

Q. Who went to the bank?

A. Mr. Kesser, Mr. Higgerson, Mr. Emanuelson and myself.

Q. You don't know whether you signed it at the bank or office?

A. We may have went to the bank and come back.

Q. Was it signed that day?

A. Yes.

Q. Was it signed while you were still acting as a result of the conference that led up to the signing?

A. To the best of my recollection it was, yes.

Dep. 9-10-57 page 58

Q Anything the contract involved about the future, I suppose you hit upon was that there were certain improbabilities or possibilities attached to the execution of the work to be done there?

A. Yes.

Mr. Fine: We object to that. We are dealing with this contract.

By Mr. Garrett:

Q. Relating to this contract, who hired the men on the job?

A. I hired the men on the job.

Q. How many of your family were working on the job besides you?

A. Two boys part of the time and part of the time one boy.

Q. Part of the time you had two members of your family hired and working on the job with you?

A. Yes.

Q. In reference to weather conditions at that time, what were they?

A. They were rough.

Q. Any estimate you make for doing a contract job you try to take into account those possibilities?

A. Yes.

Herman A. Enlow.

Q. In the summer of 1955 there was an unusual situation existing with reference to the weather?

Dep. 9-10-57 page 59

A. Yes.

Q. We had how many hurricanes that summer?

A. It seems to me three or four.

Q. We will say there was at least three?

A. Yes.

Q. Does that interfere with or hamper work of this kind?

A. Yes.

Q. Does it make it very expensive to operate when those conditions obtain?

A. Yes.

Q. Mr. Enlow, as president of the corporation of Enlow Brothers—

Mr. Fine: Enlow & Son, Incorporated.

Mr. Garrett: Excuse me.

By Mr. Garrett:

Q. As president of Enlow & Sons, you were to make application as a licensed contractor?

A. Yes.

Q. You were?

A. We had every intention to file for an application at that time.

Q. You conveyed that intention to Mr. Higgerson?

A. That is correct.

Q. You told Mr. Higgerson that while you didn't have a license at that time that you were filing for it?

Dep. 9-10-57 page 60

A. That is correct.

Q. You gave him those assurances?

A. Yes.

Q. That was in the presense of Mr. Kesser and Mr. Emanuelson?

A. Yes.

Q. You had no doubt in your mind as to your qualifications?

Mr. Fine: I object to that. It is a question of law for the Commissioner to determine. He says, "You had no doubt in your mind."

Mr. Garrett: I submit it is proper.

Herman A. Enlow.

By Mr. Garrett:

Q. You had no doubt in your mind as to your qualifications?

A. No.

Q. To secure a license?

A. Yes.

Q. You had no reason to believe that you were not going to get it promptly?

A. No.

Q. Do you remember when you made application?

A. Not without going to the record.

Dep. 9-10-57 page 61

Q. Was it prior to the time of this agreement of July 1, 1955, or later?

A. At a later date.

Q. It was at a later date?

A. Yes.

Q. How much later was it?

A. I don't remember exactly because the Board only meets three or four times a year, every three or four months, and at a later date we filed application.

Q. Can you tell us when it was afterwards?

A. Not exactly, no.

Q. I don't mean for you to be exact, but what month?

A. I don't know what month.

Q. What year was it?

A. It was some time in 1955.

Mr. Garrett: All right, that is all for the moment.

RE-DIRECT EXAMINATION.

By Mr. Fine:

Q. Mr. Enlow, when you told Mr. Higgerson about your application to be certified under the Code, did you not tell him the application had been turned down once before?

Mr. Garrett: I object to that as leading.

Dep. 9-10-57 page 62

By Mr. Fine:

Q. Did you not, in connection with your application—

A. Yes, when the first application was turned down I told him we were not certified, that they had turned it down, and we had to file again.

Herman A. Enlow.

Q. You also told Mr. Ritter that, did you not?

A. I don't remember telling him that. He didn't come down on the job. That was after it was done and started.

Q. I understood you to testify that Mr. Ritter said he could not do business with you?

A. Yes, I believe Mr. Ritter knew before we went into the contract that we were not certified. I don't remember whether we told him after the application was turned down the first time.

Mr. Fine: That is all.

RE-CROSS EXAMINATION.

By Mr. Garrett:

Q. So you tell the Commissioner and the Court that you went out there and operated this job without being licensed by the State as a contractor?

A. I was not operating the job as a contractor. I was putting the job in for Mr. Higgerson on a profit share basis.

Dep. 9-10-57 page 63 }

Q. You might sidestep me a little bit, and I will ask it again.

Mr. Fine: I object to that as improper.

By Mr. Garrett:

Q. Are you suggesting that from the period of time that you were out there working on the contract in a different guise, and you were not licensed by the State?

A. Part of the time.

Q. Tell the Commissioner whether they granted you a license during the course of the work?

A. I can tell the Commissioner I could have put in a million dollar contract without having a license.

Q. When did you get a license?

A. Some time in 1955.

Q. You were the person doing a job of this kind and you can't tell the Court when you were granted a license?

A. That is correct.

Q. What month?

A. I couldn't tell you.

Q. You can't tell us the month?

A. No.

Herman A. Enlow.

Q. Why were you getting a license if you didn't need it?

Dp. 9-10-57 page 64 }

A. Because I was bidding on other jobs with the City of Norfolk.

Q. You were handling other jobs at the same time you were handling this?

A. Yes.

Q. How many jobs?

A. Two or three.

Q. What is the condition of Enlow & Sons Corporation; is it in existence?

A. No.

Q. What happened to its assets?

Mr. Campbell: I object to that. It is not proper in this case now. If they get judgment they can summon him before a Commissioner to determine the assets of the corporation.

The Commsisioner: The objection is noted.

By Mr. Garrett:

Q. Is Enlow & Son Corporation in existence today?

A. No.

Q. When did it cease to exist?

A. June 4th, the best I remember, in 1956.

* * * * *

Dep. 9-10-57 page 66 }

* * * * *

By Mr. Fine:

Q. Mr. Enlow, you have already testified that only a few items remained to be completed before Higgerson Brothers breached this contract about failure to pay the payrolls.

What were those items that remained to be done?

Dep. 9-10-57 page 67 }

A. Finishing up the drop inlets, one or two manholes, and breaking out the ends of the pipe that extended into the drop inlets or manholes.

Q. With your experience in 36 years in doing this kind of work, how much would it take to have finished the job?

A. I would say there was ample money in the job to com-

plete it. One tier and a half of drop inlets or catch basin we could not finish them until the paving had been done.

Q. Give us the minimum or least it would take to finish the job.

A. I would say $3,000.00 would be sufficient, and it should not have been over $4,000.00.

Q. There is a minimum of three and a maximum of four?

A. Yes.

Q. Is that in accordance with the market if you could have gotten anybody to give a fair and reasonable price to do the work?

A. I would say so, yes.

Q. How much retainage was kept by the State Highway Commission?

A. It is the usual procedure, I understand, to retain 10%.

Q. Assuming that complied with the contract, 10%, how much money was coming to them to have finished the job, approximately?

Dep. 9-10-57 page 68 } A. Approximately ten or twelve-thousand dollars should have been retained.

Q. I am not talking about on the entire job but the pipe, to complete it. Ten or twelve-thousand dollars was retained, and it would cost three or four-thousand dollars to complete it?

A. Yes.

Q. So there was in any event anywhere from nine to seven-thousand dollars in the pot after doing the work?

A. There should have been.

By Mr. Garrett:

Q. If it only cost $3,000.00 to finish the job and you had a handsome bill for hire of equipment, why did you not go ahead and finish it?

A. You want me to state my reason?

Q. Yes, why?

A. Because Mr. Higgerson refused to make the payroll.

Q. You said that Mr. Emanuelson and Mr. Kesser were able to back the job?

A. Yes.

Q. They had a financial interest in it?

A. Yes.

Q. And $3,000.00 would have been necessary to complete it, but instead of doing it you pulled out and left?

Herman A. Enlow.

A. At that time we had all rental equipment tied up. We didn't get one thin dime out of it.

Dep. 9-10-57 page 69 } Q. The job was not making money is the reason you wanted to get out?

A. I say the job should not have been in the red.

Q. You got out because the job was not making money?

A. No. I carried out my end of the agreement. If it had been left entirely up to me I would have pulled out within 30 days after starting it.

Q. You knew the money was there to pay it and instead of going on with the $3,000.00 you go to some other job?

A. Sure. I had another job going. I had moved my equipment out 60 days before he asked me to go back.

Q. You are not critical of Mr. Higgerson's computation but critical because the job didn't make money?

A. I was critical to start with because he figured it too low. I figure there were four or five-thousand dollars that could have been put in, and he didn't figure the hurricanes of that year.

Q. That is one of the prime difficulties?

A. One of the difficulties.

Q. You left the job?

A. I couldn't let the equipment stay there 60 days and do nothing.

Q. That was not Mr. Higgerson's fault, but the fault of the paving contractor?

Dep. 9-10-57 page 70 } A. The reason I didn't want to go back is the man told me he would not make the payrolls.

Q. How much would it take?

A. I told you approximately three-thousand dollars should have completed the job.

Q. $3,000.00 would have completed the job?

A. I think so.

Q. What did that consist of?

A. Part of it was for material and part payroll.

Q. And you figured there would be seven or eight-thousand dollars profit there?

A. Yes.

Mr. Campbell: He said seven-thousand dollars should have been left in there.

The Witness: I said $7,000.00 should have been left.

Mr. Campbell: He said there was some ten or twelve-thousand dollars retainage and he guessed anywhere from

Herman A. Enlow.

three to four-thousand would complete it. He has never said there would be seven or eight-thousand dollars profit because they had $23,000.00 worth of rental that Higgerson has not paid. When you say seven or eight-thousand dollars profit, you are basing it on the wrong premise.

Mr. Garrett: What my friend is seeking to do is to help the witness argue the case.

Dep.
9-10-57
page 71 } By Mr. Garrett:

Q. When you advanced this figure of $3,000.00 as the contemplated cost to complete it, did you consider that in any way by any figures that you had compiled or were you just guessing at it?

A. I figured there were nine drop inlets to be completed. Half of them had been poured. The biggest part of the work was done and it should not have taken over 30 cubic yards of concrete to have completed it.

Q. How long would you have taken to do it?

A. It depends upon how straight through you could go. If I could have gone along and not have to stop, it could have been done much quicker.

Q. That is a condition that is inherent in most contracts, isn't it, delays?

A. That is the usual procedure.

Q. Taking it as a logical procedure, how long would it have taken you to have finished it?

A. If I could have gone along and not stopped I could probably have finished it in two or three weeks.

Q. When did you tell Mr. Higgerson you were not going ahead and complete it?

A. When he called me.

Dep.
9-10-57
page 72 } Q. There was no question in your mind but that you were not going to complete it?

A. No.

Q. Where were you working then?

A. We were working on Lakewood Drive, I believe, in Norfolk.

Mr. Garrett: That is all.

By Mr. Fine:

Q. Did you have any other reason not to complete the job

other than the fact that the payroll was not met by Mr. Higgerson?

A. Yes, because I left like I was hooked in the job already. I felt like I had been hooked from A to Z.

Q. When he told you he would not meet the payroll, what did you tell him?

A. That I would not complete the job.

And further this deponent saith not.

LEWIS K. KESSER,

one of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Dep.
9-10-57
page 73 } By Mr. Fine:

Q. You are Mr. Lewis K. Kesser. Will you state your name, age, residence and occupation?

A. My residence is 7404 Chipping Road, attorney and realtor, Norfolk, Virginia.

Q. Mr. Kesser, you were connected with Enlow & Son, Incorporated, were you not?

A. Yes.

Q. On the first day of July, 1955, was that the first time that you had met Mr. Higgerson, one of the partners with Higgerson Brothers?

A. Yes.

Q. Had you ever had any conversation with him before this time?

A. No.

Q. Will you tell the Court, please, the conversation you had with Mr. Emanuelson, Mr. Enlow and Mr. Higgerson?

Mr. Kellam: We object to it as an attempt to vary a written contract, and second, any conversations or discussions they had prior to the time of the contract being executed were merged into the contract.

Mr. Fine: On the contrary, they anticipated explanations of the contract, "As to any other items agreed upon," as set forth in Paragraph 3.

Dep.
9-10-57
page 74 } Mr. Garrett: Mr. Fine is testifying now.

Mr. Fine: I am answering the objection.

Lewis K. Kesser.

A. The first I knew about the parties was a call from Mr. Enlow that he had made an appointment with Mr. Higgerson and Mr. Emanuelson to meet at my office to discuss a job that was over in Portsmouth.

We met that day approximately right after lunch, and I believe that within a period of a half hour or three-quarters of an hour we had discussed a proposition in which Mr. Enlow would with Enlow & Son, Incorporated, do a job for Mr. Higgerson in which Mr. Higgerson would put up the money right down the line and indemnify everything, and we would go through this corporation and do the work.

By Mr. Fine:

Q. State whether or not there was any mention about the fact that Enlow & Son, Incorporated, was not certified under the Contract Act of the Legislature.

A. We had discussed it with Mr. Enlow within 30 days prior to the meeting and he said he had formed a corporation for the purpose of dealing in this contractural type of work, that they had not been qualified at that time but were going to make application for a contractor's license and would do same at a later date.

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Q. State whether or not Mr. Higgerson was informed that an application had been turned down at a later date.

A. Mr. Higgerson was informed of all the various steps that were taken in connection with qualifying under the contractural requirement.

Q. Mr. Kesser, in connection with this contract what was mentioned with regard to equipment?

A. Mr. Higgerson knew that—

Mr. Kellam: It is understood our objection goes to all of these questions on the grounds it is an attempt to vary the terms of the written contract, and if this took place prior to the time of the written contract it was all merged into the written contract.

Mr. Fine: Let the record show we maintain it is not in contradiction of the contract, but the agreement was made then and there about requiring equipment and was subsequently confirmed and approved by Mr. Higgerson himself.

A. (Continuing) Mr. Higgerson knew that Enlow & Son, Incorporated, had just been organized for the purpose of taking care of this work, and Higgerson & Son—

Lewis K. Kesser.

By Mr. Fine:

Dep. 9-10-57 page 76 } Q. You mean Enlow & Son?

A. Enlow & Son, and Mr. Emanuelson and myself also knew the corporation had no equipment to do the job, and he also knew the corporation had no funds.

Mr. Garrett: We object to the witness constantly stating what somebody knew as a conclusion, and for him to state what somebody else knew is improper.

By Mr. Fine:

Q. Did you talk about it, or not?

A. It was discussed in detail prior to any culmination of the agreement. I have this to say: We stated to Mr. Higgerson that if it was his intent to have Enlow & Son do the work and completely take over and indemnify Mr. Emanuelson and myself from any liabilities of payroll, it would give this corporation a boost in doing the $85,000.00 job and, therefore, get the corporation on its feet without any liability for any advancement in funds and without taking any chance in any way.

Q. Specifically what was said about equipment?

A. Equipment was to be rented and, if you will note from the records here, the first date of the rental equipment was to be paid and then right on down the line.

Some $5,000.00 or more was paid for the first month, notwithstanding the fact that the bills were paid possibly much later, and rental equipment discussion came up and

Dep. 9-10-57 page 77 } Mr. Higgerson consented to our going out and buying equipment to have it on the job.

This was to be definitely a part of the funds to be paid or used from month to month.

Q. Let me interrupt you. You said you were going out and get equipment?

A. Yes.

Q. Who was to pay for the rental on the equipment?

A. The rental was to be paid by Enlow-Higgerson account, from which they were going to back every phase.

Q. Who do you mean?

A. Higgerson and his brother. There were sufficient funds in the Ritter account.

Q. What did you do then?

A. It was agreed that if we had our own equipment it would be on the same basis of rental, and thereafter Mr.

Lewis K. Kesser.

Enlow and Mr. Higgerson went out and bought equipment and Mr. Emanuelson and I endorsed the corporation note.

Q. How much was it?

A. $20,000.00.

Q. How much rental per month did you expect on it?

A. Expected the rental to be what we were paying other people.

Q. Did Mr. Higgerson agree to that?

A. Yes.

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Q. Did, or not, he agree to pay this?

A. Yes.

Q. By payments with checks?

A. Yes.

Q. After you all had bought the equipment, then you submitted a bill for rental the first month, did you not?

A. Yes.

Q. What did Mr. Higgerson say about that?

A. I don't know what Mr. Higgerson said I didn't have the conversation with him Mr Enlow came back with the bill we had submitted to him and stated—

Mr. Garrett: We object to what Mr. Enlow told you.

A. (Continuing) He came back and said he had submitted a bill.

Mr. Campbell: You can't tell what he told you.

By Mr. Fine:

Q. Mr. Kesser, after the first month the bills were not paid and arrangements had been made about that, when was the first time you knew that Higgerson Brothers denied owing this bill of March 20, 1956?

A. After we sent him a bill, the first time he ever objected to owing it.

Dep. 9-10-57 page 79

Q. What happened with regard to his paying the rental equipment and his getting $3,000.00 in the job?

A. The $3,000.00 was the agreement that we originally made. Mr. Higgerson came into the office and said it was a sleeper bid. He explained to us there was $20,000.00 in it. He mentioned to us that without doubt that much money was there.

Mr. Enlow disputed that amount at this particular meeting and said that, in his opinion, he didn't believe it could be over

$12,000.00 profit. I interceded and said if there was $12,000.00 profit "you are taking care of the bills and I personally feel you should get $6,000.00 of the $12,000.00."

I also told him that he would get the first $6,000.00 under any circumstances as far as profit was concerned, that he had an estimate of the maximum that he could possibly make under any circumstances which, in his opinion, was $8,000.00. His making a profit of that amount, potential profit, was beyond my comprehension.

Mr. Garrett: We object to that. The witness is arguing the case, and move to strike it out.

A. (Continuing) He understood that was the maximum because I came in and interceded and said, "That is the maximum figure."

He came in and said, "No, I don't think we are entitled to that much.".

Dep. 9-10-57 page 80 } It was based on the premise there was no liability contingent on us to allow more because actually the corporation was performing the work and Higgerson had agreed with the Ritter Corporation—

Mr. Garrett: We move to strike out all of this as it just reflects his opinions and is argument of this witness and an attempt to vary the written terms of the contract and would not be admissible.

By Mr. Fine:

Q. As I take it, the $3,000.00 he was to get from the job was because he was to pay rental on the equipment?

A. Yes.

Mr. Garrett: We object to that as leading.

By Mr. Fine:

Q. Why did you say he would get $3,000.00 in any eventuality? What was said to him and what did he agree to?

A. There were the four of us there and we discussed this question, and it was problematical—

Q. Tell us what the conversation was between you and him at that time.

A. The conversation was that, "I am financing this money and taking all risk." He said, "According to Mr. Enlow's opinion, there is only $20,000.00 profit—

Lewis K. Kesser.

Q. You don't mean $20,000.00 profit?

Dep. 9-10-57 page 81 } Mr. Garrett: He is a practicing attorney and doesn't need your help. You are coaching the witness.

A. The $3,000.00 was to be given Mr. Higgerson as a hedge and buffer on any eventuality at all.

By Mr. Fine:
Q. What was said?
A. He said, "I am taking the obligation of taking the job, financing it, taking all risk, paying all payrolls and bonds, and you are not in position to do the job because you are not a licensed contractor, and I am entitled to that."
Q. What specifically did he say he would pay for the rental as to fair value?
A. There was no discussion as to fair value because whatever the equipment would be would be in accordance with a fair rental and the bills we submitted would be honored.
Q. When did he say that?
A. At the time of the contract.

Mr. Garrett: We move to strike that out as being in conflict with the written terms of the agreement.
Mr. Fine: We disagree with you.
The Commissioner: The objection is noted.

By Mr. Fine:
Dep. 9-10-57 page 82 } Q. Did he agree to pay for the rental equipment after the contract was executed?
A. Yes.
Q. Did he, in fact, pay for the rental equipment from other sources?
A. Yes.
Q. If he had not agreed to pay for the fair rental value of the equipment, could you have possibly made any money on the job?

Mr. Garrett: We object to that as immaterial and irrelevant.
Mr. Fine: I want to say it would have been impossible for them to have made a dime.
Mr. Garrett: You are operating on hindsight now.
Mr. Fine: Answer the question.

Lewis K. Kesser.

A. There would be no profit in it at all basing it on his own value of the rental equipment in regard to what was in the job.

By Mr. Fine:

Q. I hand you herewith Plaintiff's Exhibit 2 and ask you if there is anything in this agreement that Enlow & Son were to furnish the equipment on that job free, as contended by our friends?

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Mr. Kellam: We object to that on the grounds it speaks for itself, the agreement does.

Mr. Garrett: I presume the Commissioner and the Court are going to construe this contract and not rely on Mr. Kesser's interpretation. Those are the functions that are reserved for the Court and the Commissioner.

Mr. Fine: Anything we can aid them in, we want to.

Mr. Garrett: I don't think that is any aid.

A. There was a definite agreement between Mr. Higgerson and others at two conferences that all expenses, no matter what it would be, and rental of equipment was primarily discussed, and he agreed he would make the payments

Mr. Garrett: We move to strike that out on the grounds that he is trying to inject into the contract subsequent agreement.

Mr. Campbell: This line of interrogation deals with this portion of the contract, "And any other item agreed upon." That is in Paragraph 3, in the fourth line from the beginning of that paragraph.

This testimony clears up orally what other items had been agreed upon.

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It is the testimony of this witness and the contention of the defendants that the rental of equipment that Enlow & Son subsequently went out and purchased for use on this job was to be paid for by Higgerson.

It is not a violation of the parol evidence rule to introduce testimony where the contract itself does not completely cover it. It leaves open by its terms the admission of oral testimony to establish what other items were agreed upon by the parties, and it is for the Commissioner in determining items

that had been agreed upon that were not covered by the contract. That is the purpose of the entire examination.

Mr. Garrett: Since Mr. Campbell has argued the case I feel bound to make this statement: This contract was prepared and drafted by Mr. Kesser, an attorney, and if it contains any ambiguity or uncertainties it ought to be construed against the draftor.

He is testifying in direct conflict to the express terms of the contract, and any testimony given contrary to that which varies the written instrument is inadmissible.

Dep. 9-10-57 page 85 } Mr. Fine: For the purpose of the record, Mr. Kesser has just explained the other items of expense in there, and states that was the reason why they were giving them $3,000.00 over and above anything, or in any eventuality, because they were paying for the equipment rental.

Mr. Garrett: Can't we stipulate that Higgerson Brothers never paid a dime to Enlow & Son at any time for rental in this case?

Mr. Fine: There is something in the record they did pay rental.

Mr. Garrett: They paid rental for equipment furnished by others, but no money was actually paid to Enlow & Son for any equipment they owned. I don't want to belabor that.

Mr. Fine: Of course you don't.

By Mr. Fine:

Q. Did you and Mr. Emanuelson and Mr. Enlow rely on the representations of Mr. Higgerson that this was a sleeper?

A. We did.

Q. Did Mr. Higgerson show you the cost estimate showing that he was going to make less than $8,000.00 on the job?

A. No, he didn't show any such thing. He built it up that if our job ran in the neighborhood of $85,000.00 we were sure to have a $20,000.00 profit.

Dep. 9-10-57 page 86 } Q. Did Enlow & Son, Incorporated, breach this contract?

A. No.

Q. Will you tell us the circumstances of how the job came to an end?

A. The job came to an end upon Enlow & Son, Incorporated, doing the work that was required to the time another sub-contractor stepped in the picture to do work that it was

Lewis K. Kesser.

testified took two months to do before Enlow & Son, Incorporated, could come back into the picture.

Q. Three months. The record shows July 1st.

A. Their failure to finish the work I didn't object to.

Q. Why didn't you object to it?

A. I didn't object to it because we didn't feel that we should pay the payroll which Mr. Higgerson said he would not pay.

Q. Did you ever tell him you would make the payroll?

A. No, sir.

Q. Is it a fact that Enlow & Son, Incorporated, advanced money on the job for payrolls?

A. Yes.

Q. On three different occasions?

A. Yes.

Q. Do the records of the corporation indicate they failed to reimburse them for that?

Mr. Kellam: We call for the records as the best evidence.

Dep.
9-10-57
page 87 } A. Advances were made to Enlow-Higgerson account of $350.00 that have been paid.

By Mr. Fine:

Q. Calling your attention to misrepresentations, I want to ask you regarding Paragraph 6 in connection with this contract dated the first day of July, 1955. Did you ever orally contemporaneously with or subsequently agree to indemnify Higgerson Brothers for any loss they claim?

A. No.

Q. Will you tell the Court about that?

A. The item was not mentioned at the time of our entering into the contract. Mr. Higgerson mentioned the fact he had other work and could not do this job at all, that it was a sleeper with a lot of money to be made and he would like Enlow & Son, Incorporated, to do the work for him.

I went so far as to volunteer and tell him, "We don't expect any charity from you and we don't want anything at all if you are going to do the things you tell me you are going to do and save us completely harmless." I told him, "You should have some compensation for the work in any event and I agree with Mr. Emanuelson that we should indemnify you up to $3,000.00 if there is any loss, and that to act as a buffer for your doing the job."

Lewis K. Kesser.

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Mr. Kellam: We object to that question and answer upon the grounds it is entirely self-serving, and move to strike it out.

The Witness: It is a conversation direct with Mr. Higgerson.

By Mr. Fine:

Q. Did you make any agreement personally to indemnify him for any loss?

A. No.

Q. Or did Mr. Emanuelson?

A. No.

Q. How did he get into the picture personally?

A. He got into the picture because the corporation was set up for Mr. Enlow and his son to do the job, and Mr. Emanuelson came into the office and tied in with them in the corporation.

He wanted me to go in the corporation on the basis that they would do the work with W. D. Hobbs on the job, and Mr. Emanuelson had a contract.

The stock was divided equally four ways. Mr. Enlow was president, his son was vice-president, I was secretary and Mr. Emanuelson was treasurer.

We knew that the corporation had nothing and that is the reason why Mr. Emanuelson and I volunteered to back the corporation to the extent of $3,000.00 on this particular job

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and Mr. Higgerson was going to get Enlow and Son, Incorporated, to do the work as a sub-contractor, not as an independent contractor for him, he to pay the monies from the account of Enlow-Higgerson.

Mr. Garrett: This is simply argument.

The Witness: That is what he said to me.

By Mr. Fine:

Q. In connection with Paragraph 6 which I hand you in connection with you and R. A. Emanuelson, state what that was in connection with. It reads:

"As a further provision of surety, the undersigned, R. A. Emanuelson and Lewis K. Kesser do sign this agreement with the express stipulation that they together with Enlow & Son, Incorporated, will save Higgerson Brothers harm-

less from all claims, liabilities not covered by the insurances noted to be obtained in the Paragraph 5."

A. Mr. Higgerson said at that time that he didn't know what type of insurance he had. He said, "Fellows, I don't know what you are going to do. You are doing the job for me. I don't know what insurance I have."

I told Mr. Higgerson, "You need not worry about Mr. Enlow's ability to do the job. He knows his business and we will save you harmless if you are not covered with proper liability coverage if you are afraid of a landslide or cave-in."

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Q. Did he tell you at any time anything about making claim on you as surety?

A. No, never by letter, phone call or in any way.

Q. Mr. Kesser, are you familiar with the extra work he wanted done on this job?

A. Nothing other than a letter I received at the office requesting us to intercede in doing the extra work and told us to submit a bid.

Q. What was your reply?

A. We submitted a bid for the work and it was too much.

Q. He refused to take it?

A. Yes.

Q. Didn't accept it?

A. No. It was given me to understand that it was a complete optional set-up as to the extra work and we didn't have to do it but we could do it if we wanted the work.

Q. Did they ever make any claim about the $3,000.00 or did they seek to get all of the loss?

A. They came over one time to my office and tried to indicate that they were going to look to Mr. Emanuelson and myself for $3,000.00.

By the Commissioner:

Q. Who is "they"?

A. Mr. Hodges and Mr. Higgerson came over to my office and tried to insinuate they were going to look to Mr. Emanuelson and myself for $3,000.00 indemnity and I explained to them that, "As far as the indemnity is concerned I don't believe there has been a deficit," and we left with the impression there was sufficient money on hand to take care of all debts.

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Lewis K. Kesser.

By Mr. Fine:

Q. In connection with your having taken the job without being certified, were you certified as a licensed contractor after the job was taken?

A. Yes.

Q. From your knowledge of the transaction, were Higgerson Brothers supposed to supervise the job, or not?

A. Mr. Higgerson was an experienced man according to Mr. Enlow and he and Mr. Enlow had agreed they would both supervise the job.

Q. Was that representation made before you entered into the contract or afterwards?

A. At the drafting of the contract—the only drafting made of this particular contract was my sitting down at the typewriter and typing as we discussed the matter. Discussions were had on various and sundry items as we went along.

Mr. Garrett: We move to strike out and object to what the terms of the contract were which are in conflict with the written agreement.

Dep.
9-10-57
page 92 } By Mr. Fine:

Q. Did Mr. Higgerson supervise the job, or not?

A. Not to my knowledge.

Q. Would you have entered into the agreement with Mr. Enlow if Mr. Higgerson had not agreed to supervise the job?

A. I would not have bothered to have the corporation enter into the agreement with Higgerson unless he was going to take an active part in the work.

Q. Why?

A. Because it was Mr. Higgerson's bid and job, and he was supposed to carry it through as far as supervising the work was concerned.

I didn't know Mr. Enlow but possibly a month prior to this time.

Q. You had only known him about 30 days?

A. That is right.

Q. Do you know anything yourself about the pipe work?

A. No.

Q. Did you rely entirely on what Mr. Higgerson told you?

A. Yes.

Q. There has been some mention made about this corporation. Has the corporation been dissolved?

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A. No.

Q. Without waiving our objections in connection with foreclosure, was that in connection with the equipment?

A. Yes, that was for the equipment.

Q. Was that foreclosed?

A. Yes.

Q. Is the corporation still in existence?

A. Yes.

Q. And solvent?

A. Yes.

Q. Have Higgerson Brothers up to this time had more than enough to pay the debts?

A. Yes.

Q. So I take it the Higgerson deal was almost a fatal wound but is not altogether quite fatal?

Mr. Garrett: Mr. Fine is now testifying in a poetic fashion.

A. I don't think it is going to be fatal because they would have backed out of the deal.

By Mr. Fine:

Q. With regard to these insurances, you and Mr. Emanuelson say you would save Higgerson Brothers harmless on, did you ever get any claim made against you by reason of lack of insurance?

A. No.

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Q. Could there have been any misunderstanding on his part that you and Mr. Emanuelson were not personally liable for this contract?

Mr. Kellam: I object to that as speculative.

A. It was never contemplated that Mr. Emanuelson and I would be personally liable, but on the suggestion that Mr. Higgerson didn't know what insurance he had the $3,000.00 agreement was made to the effect that he would get that in any eventuality.

By Mr. Fine:

Q. Did Enlow & Son furnish all required statements and reports about payroll data?

Lewis K. Kesser.

A. Yes.
Q. I believe the bank account was opened up in the name of Enlow-Higgerson?
A. Yes, in partnership form.
Q. So long as he supplied the payroll?
A. Yes.
Q. After that it was discontinued?
A. It is still open.
Q. So far as money is concerned, no money was deposited in the payroll account?
A. No.

Dep. 9-10-57 page 95 } Q. Did Higgerson Brothers discount purchases and obtain discounts?
A. I didn't handle any of that. I was not interested in the bills being paid until the final determination of it.

Mr. Fine: That is all.

CROSS EXAMINATION.

By Mr. Garrett:
Q. Mr. Kesser, you are a practicing attorney in the City of Norfolk?
A. Yes.
Q. And you have been licensed how many years?
A. Since 1932.
Q. So for approximately 25 years you have been a licensed attorney?
A. Yes.
Q. And you have a law office here?
A. Yes.

* * * * *

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* * * * *

Q. You made the statement, I believe, that you relied on Mr. Higgerson in this matter. Didn't you place any reliance or any confidence at all in Mr. Enlow or Enlow Brothers and your company?

Lewis K. Kesser.

A. Yes.

Q. Did Mr. Enlow make any investigation concerning this work? Did he go there and look at the job?

A. It was not necessary under the agreement we entered into.

Q. You mean Mr. Enlow never went to the site of the job?

A. As far as I know, he didn't.

Q. He didn't tell you he did?

A. He said he met with Mr. Higgerson one time and walked over and he showed him where the job or the work was but I don't think he went into the details.

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Q. He went into it far enough to figure on a $12,000.00 profit?

A. Mr. Higgerson said $20,000.00 and Mr. Enlow said about half that.

Q. You were carrying on a conversation about how much you could make?

A. Yes.

Q. Your man said $12,000.00 and Mr. Higgerson said $20,000.00?

A. Yes, and I relied on it.

Q. That was no responsibility of yours?

A. I relied on it to the effect that I would not have a corporation that I am interested in doing a job unless there is a profit.

Q. Where have you been misled regarding the rental for the equipment?

A. That is not profit. That is a fair rental that we were going to get back for equipment we had paid for.

Q. You know people in the rental business don't rent it for exactly what it costs?

A. That is right.

Q. And you do the same thing?

A. Yes.

Q. So you would have made a profit?

A. As far as the rental of equipment is concerned.

Dep. 9-10-57 page 101

Q. Where have you been misled? You have told the Commissioner about the $20,000.00, and yet you don't owe him for the $3,000.00?

A. Mr. Higgerson said that after payment of rental on the equipment and expenses there would be $20,000.00.

Q. Where have you been misled?

Lewis K. Kesser.

A. Mr. Higgerson said after payment of all rental equipment and expenses there would be $20,000.00.

Q. It has often been said that when you write something you hate to have it read back, but look in Paragraph 4 which provides: "Upon which amounts received under the terms of this bid to Higgerson Brothers shall be deposited; that withdrawals shall be made for materials, payrolls or other expenses when such funds are available."

A. No, that is supposed to be from Ritter.

Q. You don't contend Mr. Higgerson was going to pay you for something that didn't come out of the job?

A. Yes.

Q. Where is that in the agreement?

A. That was the understanding.

Q. That is one of the important things you didn't see fit to put in writing?

A. That was the understanding. There was no ifs, ands and buts about it.

Dep. 9-10-57 page 102

Q. In addition to that they were to pay for the use of the equipment, rental, at a price on which you were realizing a profit?

A. They used our equipment and that was the understanding.

Q. Where is it in the contract?

A. It should be in there if it is not in there.

Q. It should have been in there?

A. I could have put it in there. Higgerson Brothers were to receive $6,000.00 of the money gotten out of this particular job—Higgerson Brothers was to receive $6,000.00 for their part of the money under the terms of the bid from the Ritter Corporation over and above expenses which may be incurred by reason of additional items which are mentioned in Paragraph 2, "And any other item agreed upon."

Q. Do you mean they were to pay all expenses on this job and you were going to give them $3,000.00 back if they had to pay more expenses than the job was worth?

A. Yes.

Q. What, in the name of heaven, inducement would there be for Higgerson Brothers entering into any such contract with you?

Mr. Fine: I object to that as argumentative and for the further reason that they agreed to take care of any loss he may have sustained by reason of insurances.

Mr. Garrett: I withdraw the question.

Lewis K. Kesser.

Dep.
9-10-57 By Mr. Garrett:
page 103 } Q. You know Workmen's Compensation covers anybody getting hurt on the job?

Mr. Fine: There was no employee and employer relationship.

By Mr. Garrett:
Q. Were you an independent contractor on the job?
A. I didn't say that.
Q. Your counsel said it.

Mr. Fine: He said anybody who got hurt on the job—

A. Mr. Higgerson was of opinion there would be some liability on him and he wanted some assurance he wouldn't be personally liable.

By Mr. Garrett:
Q. What liability did he mean?
A. A cave-in and a man being covered by dirt, such as that.
Q. Did you tell him Workmen's Compensation would cover that?
A. I didn't. I didn't know anything about Workmen's Compensation.
Q. Didn't you think Workmen's Compensation would take care of that?
Dep. A. No, I didn't know anything about it.
9-10-57 Q. You transferred the assets from Enlow
page 104 } Brothers' Corporation to another company?
A. No.
Q. Are you in control of those assets?
A. No.
Q. What happened to them?
A. They were foreclosed at sale and Mr. Emanuelson bought them in.
Q. You are in the same business Mr. Enlow is?
A. No.
Q. You are not a member of the same corporation?
A. I am in another corporation with him.
Q. Are you a member of the corporation doing the work?
A. Yes.
Q. What is the name of the company?

Lewis K. Kesser.

A. Drainage Engineering Corporation.

Q. Why didn't you put in this contract that this job was guaranteed to make $12,000.00?

Mr. Fine: I object to that as argumentative and not proper cross examination.

A. Do you think it was necessary?

By Mr. Garrett:

Q. I am asking you the question. Why didn't you put it in there?

Dep. 9-10-57 page 105 } A. I didn't think it was necessary.

Q. You tell the Commissioner you relied on this proposition that $12,000.00 was going to be made?

A. Yes. It is in there to the extent of six and six.

Q. Show me where there is any guarantee that $12,000.00 would be made out of the job?

A. "However, if in the event there is not a net profit at the termination of the work under this bid in the amount of $6,000.00 or over, then, in that event the sum to be received by Higgerson Brothers shall be the sum of $3,000.00 and this amount is to be received by them notwithstanding any eventuality."

Q. You recognized the fact that there might not be any profit?

A. I recognized the fact that $12,000.00 was under discussion and a portion of this $6,000.00 would go to him, but so far as profit and loss was concerned that we would suffer no more than $3,000.00.

Q. Instead of Higgerson Brothers indemnifying you you indemnified them?

A. Yes.

Q. $3,000.00?

A. If there was any loss.

Q. You first recognized the possibility of loss along towards the end?

Dep. 9-10-57 page 106 } A. Yes.

Q. If there was a loss, what did you agree to do?

A. After all bills were paid and expenses we would indemnify him $3,000.00.

Q. Does that say after all bills were paid?

Lewis K. Kesser.

A. That was understood.

Q. That was understood but not put in the agreement. Don't you think it would have been much better to have put it in there? What was your reason for not putting it in there?

A. It says they were to pay off everything, in Paragraph 3. That is one of the things he agreed upon.

Q. You don't contend that Higgerson Brothers ever paid a red cent for any equipment you owned?

A. No, but they owed it according to the final agreement.

Q. You said the company was in bad shape. Why did you wait until, as you say, they owned you $23,000.00 before you made demand for payment?

A. To help Mr. Higgerson out. He said he didn't have the payroll. He asked us to go along with him until the end of the job.

Q. Do you have any correspondence about that?

A. It was not necessary to because it was understood and agreed to.

Dep. 9-10-57 page 107 } Q. This figure of $23,000.00 comes out rather closely to the contention of the plaintiff?

A. It comes out what was due for equipment and whether that figure was a different figure, you could add what you please.

Q. How could you afford to carry an obligation that you contend was owing you in a corporation that had nothing, for the benefit of Mr. Higgerson?

A. That is what I did.

Q. I thought you said your company didn't have any particular assets and it started out in the red?

A. Yes.

Q. You operated until the bill for $23,000.00 was submitted that you claim was owing for rental on equipment?

A. Yes.

Q. With reference to the license of Enlow & Son, you have never had any thought but that it was a proper corporation to receive license under the Contractor's Act?

A. I had no doubt but that it was.

Q. You believed it was?

A. Yes.

Q. Did you reveal to him in conversations you had that you expected to get a license?

A. Yes, that we were not licensed but going to be.

Lewis K. Kesser.

Dep. 9-10-57 page 108

Q. You anticipated that you would secure a license?

A. Yes.

Q. You never told Mr. Higgerson afterwards you didn't have one?

A. Yes.

Q. There was no significance in that, was there?

A. He was given that information.

Q. What difference did it make to him if you say you were just working for him?

Mr. Fine: I submit that is argumentative as well.

Mr. Garrett: It is cross examination.

By Mr. Garrett:

By Mr. Garrett:

Q. Coming back to the fact that you didn't have a license had no significance with reference to your contract from your standpoint, from your factual standpoint? Did it make any difference whether you were licensed, or not?

A. No.

Q. Why?

A. I had not gotten a license for anyone.

Q. Why?

A. Because he was led to believe we were going to get one.

Q. You did get one?

A. One was turned down in October, 1955.

Dep. 9-10-57 page 109

Q. During the time this work was in progress?

A. Yes.

Q. You had applied for it prior to the time you signed the contract in July, 1955?

A. No. Prior to July 1st?

Q. Yes.

A. If we had I don't remember it one way or the other.

Q. Let's don't try to escape by memory. You have some records there. I ask you whether or not you had applied for a license prior to July 1, 1955?

Mr. Fine: Let the record show he is looking at some records.

A. I may not have all the records here and I don't remember the exact date, but we tried to become registered under a proper registration as soon as we could after the beginning

of the corporation. The corporation was organized on June 1st, and there may have been a possibility we applied for it between June 1st and July 1st.

By Mr. Garrett:
Q. Look in your file and tell us when you made application.
A. I don't have the file.
Q. Do you deny you made application prior to July 1, 1955?
A. No.

Dep. 9-10-57 page 110

Q. You can't be of any help to us as to whether you did or did not?
A. If it has any material value I can get it for you.
Q. I see you have a certificate in there?
A. That is before—
Q. Will you produce it, please?

Mr. Fine: The records shows the witness testified a certificate was issued in October, 1955, and I presume the witness has given counsel correct information.
Mr. Garrett: We would like to have it introduced in evidence, certificate No. 3536 dated the 20th day of October, 1955, issued to Enlow & Son, Incorporated, and ask that it be marked.

By Mr. Garrett:
Q. Can you identify it as the instrument I just described?
A. Yes.

Mr. Garrett: We offer it in evidence.
Mr. Fine: We would like to withdraw it.
Mr. Garrett: This expired on December 31, 1955.

By Mr. Garrett:
Q. Did you get one for 1956?
A. No
Q. You never renewed it?
A. No.

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The Commissioner: It will be received and marked Plaintiff's Exhibit 14.

Lewis K. Kesser.

By Mr. Garrett:

Q. Are you sure of that?

A. I really don't recall.

Q. Look through your file and see if you didn't get one in 1956?

A Voice: We didn't renew it for 1956.

By Mr. Garrett:

Q. Do you stand on that statement, that you didn't renew it?

A. I don't know. We have never used a registration number for any particular job or bid job. We may have renewed it that year but never used it and it expired in 1956.

Q. I want to know whether or not this certificate was renewed in 1956?

Mr. Campbell: I want to make this objection: This witness has answered that he was not certain whether it was, or not, and has answered that question four or five times.

By Mr. Garrett:

Q. You were the principal stockholder in the corporation at the beginning of 1956?

Dep. 9-10-57 page 112

A. Not the principal.

Q. But a stockholder?

A. Yes.

Q. You were attorney for them at the beginning of 1956?

A. Yes.

Q. Secretary and treasurer?

A. Secretary.

Q. Can you from any file which you have got here determine whether you were issued a license in 1956?

A. I don't have the files, as far as the files are concerned.

Q. Do you have the files in your office?

A. Yes.

Q. Could you determine from them whether you were licensed?

A. Yes.

Q. Mr. Kesser, I am looking at the answer and grounds of defense, Paragraph 6, filed over your name by Mr. Fine, in which it is alleged that?

"That the said contract is invalid in that the contract en-

tered into between the plaintiffs and Enlow & Son, Incorporated, was in violation of Section 54-113 of the Code of Virginia, in that the plaintiffs knew that the defendant, Enlow & Son, Incorporated, was not registered, and had not applied for registration in accordance with the Building Contractors Code of Virginia."

Dep.
9-10-57
page 113 } Do you subscribe to that as—

Mr. Fine: It is our position and has been that if Higgerson entered into a contract with Enlow & Son with full knowledge that it was not a registered contractor, under the case of Bowen against Electric Co. that it is *pari delecto,* and it cannot be subsequently cured. He has asked him whether he subscribed to it, and it is a legal question.

Mr. Garrett: It is a question of fact as to whether he applied for a registration. Do you contend he didn't?

Mr. Fine: We do.

By Mr. Garrett:

Q. You had applied for a registration at the time this agreement was entered into; is that true, or not?

A. I will have to repeat. You asked the question before and I told you I didn't remember if it had been, or not. My same answer applies. I don't remember if we had, or not.

Q. If I can show that you did, would you deny it?

A. No.

Q. You are just neutral on the point?

A. I don't remember exactly when we applied for it.

Q. He asserted in your answer that you had not applied for it?

Dep.
9-10-57
page 114 } Mr. Fine: I object to that on the grounds they were not certified contractors when the contract was entered into between Enlow & Son and Higgerson Brothers.

It is a fact which is uncontradicted that at the time of the execution of the agreement; to-wit, on July 1, 1955, Enlow & Son, Incorporated, was not certified as registered contractors under the Acts of the Legislature.

Lewis K. Kesser.

By Mr. Garrett:

Q. It is asserted in the answer that you had not applied. Did you furnish that information to your attorney and did you subscribe to that information?

A. I don't remember too much about that. I know we were not registered—

Q. Did you read your pleadings?

A. Well—

Q. As a practicing attorney, you know you went over those with Mr. Fine?

A. I am not in this matter as an attorney.

Q. Can you divorce yourself as an attorney in the matter and say whether it was shown to you, or not?

A. I don't know whether it was shown to me.

Q. You don't know that?

A. No.

Dep.
9-10-57
page 115 } Mr. Campbell: It might be called to your attention that that portion of the answer which says that the contract is invalid because Enlow & Son, Incorporated, was not registered and had not applied for registration in accordance with the Code of Virginia might well be expunged from the answer as surplusage. They may have made application a dozen times, but it has nothing to do with the issues in this case.

Mr. Garrett: That is your opinion. I presume that everything that is put in a pleading, under rules of the Court, they vouch for to the best of their knowledge. I am trying to find out whether he has that information now, and he doesn't know.

By Mr. Garrett:

Q. Mr. Kesser, where did you put in this agreement that Mr. Higgerson was to supervise anything? You wouldn't have entered into the agreement if he had not agreed to supervise it?

A. Yes.

Q. Where in the agreement does it say that Higgerston was going to supervise anything?

Dep. 9-10-57 page 116 } Mr. Fine: I object to that on the grounds that the contract speaks for itself.

Mr. Garrett: This happens to be the author of the contract.

Lewis K. Kesser.

By Mr. Garrett:

Q. Having drawn it up in your own language and being a party in interest I suppose you would have put it in there. Where is there any such paragraph in there, that he was going to supervise it?

A. It is permeated all through the contract.

Q. Put your finger in one place.

A. It may not be in proper writing but it is the intent of the parties.

Q. The intent of the parties is not expressed in the writing?

A. I thought it was expressed in the contract.

Q. Show us where the word "supervise" appears in there or any word of like import. Here is a copy of it.

A. I can't do any more than to say that was the intent of the parties.

Q. You agree it is not in there?

A. I would have to read it again.

Q. How many times have you been over this since the controversy started?

Mr. Fine: I object to that as argumentative.

Dep.
9-10-57 By Mr. Garrett:
page 117 } Q. You mean you came here when you knew there was a controversy over the terms of the contract without reading it?

A. I don't think that calls for an answer. I recall reading it a couple of times and I don't recall that there was any doubt about Mr. Higgerson was in position to supervise the job.

Q. I understand that, but I was directing your attention to the written instrument and asking you to show us where it was in there.

A. I had overlooked it probably.

Q. Is there anything in there about it?

A. I don't know, but he was to do it.

Mr. Fine: I submit there is an implication of that under paragraph 7.

Mr. Garrett: I am not asking you, Mr. Fine. You are not sworn.

* * * * *

Dep.
9-10-57
page 118 }

* * * * *

LEWIS K. KESSER,
a witness herein, having been previously sworn and examined in part, resumes the stand for further examination and testified as follows:

Dep.
9-10-57
page 119 } CROSS EXAMINATION.

By Mr. Garrett:
Q. Were you representing Mr. Enlow in his business dealings?
A. No, sir.
Q. Other than being attached to the Enlow Brothers Corporation?
A. Not representing—we were interested together in this particular thing.
Q. You are not his lawyer, and he is not a lawyer?
A. No.
Q. The corporation had no lawyer then but you?
A. No.
Q. Enlow & Son?
A. No.

Mr. Garrett: I believe that is all at this time.

RE-DIRECT EXAMINATION.

By Mr. Fine:
Dep. 9-10-57 page 120 } Q. Mr. Kesser, I want to ask you about a couple of questions. Was there any reason other than the fact that Higgerson Brothers refused to go through with the job why you didn't finish the job?
A. No reason.
Q. In connection with the $3,000.00 that was to be paid to

Higgerson Brothers, was there any personal obligation on you and Mr. Emanuelson in that connection?

A. No, sir.

Mr. Garrett: That is a conclusion of law and we object to it.

Mr. Kellam: And contradictory of the contract.

A. (Continuing) The only item of $3,000.00 was that Enlow & Son, Incorporated, who was going into this venture with Higgerson Brothers would be responsible for the $3,000.00.

By Mr. Fine:

Q. Was there any contention on your part with Mr. Enlow regarding the $3,000.00?

A. No.

Mr. Garrett: We move to strike that out on the grounds that the contract determines that.

By Mr. Fine:

Q. I ask you whether or not you and/or Mr. Enlow agreed to personally indemnify Higgerson Brothers in this matter?

Dep. 9-10-57 page 121

A. No, not to personally indemnify them other than in connection with the insurance coverage.

Q. Upon what?

A. If there is personal liability Higgerson may have incurred by failing to have liability insurance.

Mr. Fine: I think that is all.

RE-CROSS EXAMINATION.

By Mr. Garrett:

Q. If I understand you correctly, at the time you signed this you signed this clause which purports to be surety of some kind, you didn't know what insurance Mr. Higgerson had?

A. No, I didn't know, but I do know what I signed for.

Q. I don't believe I asked you that. You didn't know what type of accident or what kind of insurance he had, whether he had insurance that would cover any particular type of liability; you had no information on it at all?

A. He informed me he had liability that would normally

take care of normal things if he was supervising the job and if he could see everything was going on all right but possibly with Enlow on the job it might be greater liability on him than he had coverage for.

Dep. 9-10-57 page 122 } Q. Did I understand you to say that you didn't know the types of insurance that Mr. Higgerson had at the time you entered into this agreement?

A. He said he had the normal type of liability insurance that covers all types of business but he didn't know the extent of the liability, and insurance was discussed in connection with there being a great calamity on the job as he mentioned a cave-in.

Q. Was it of any interest to you to know whether he had liability insurance?

A. I took it for granted he had liability insurance.

Q. What did you take for granted that it consisted of?

A. Workmen's Compensation.

Q. Workmen's Compensation?

A. Yes, possibly $20,000.00 or $25,000.00.

Q. So if it consisted of $20,000.00 or $25,000.00, you were going to undertake to be surety for anything in excess of that?

A. Yes.

Q. Over $20,000.00 or $25,000.00?

A. I don't remember the exact amount but anything over and above what he was covered with.

Q. You would not sign as surety to cover an unlimited amount of risk without discussing it with him?

A. We had that discussion.

Dep. 9-10-57 page 123 } Q. I am trying to find out what it was. You say he had normal insurance on a job of this kind?

A. He said he had a normal type but might not cover some things listed on the job.

Q. You mean to say there was no coverage on the job?

A. Yes, there was.

Q. You were going to sign an agreement agreeing to underwrite all liability claims against a portion of that particular job if he was not supervising it?

A. I said before he didn't know the extent of liability coverage he had.

Q. Whether $25,000.00 or $50,000.00 coverage?

A. Yes.

Q. You could have found out very easily by calling the insurance representative?

A. I suppose so.

Lewis K. Kesser.

Q. You didn't feel that you would incur liability by signing it?

A. That is right.

Q. It is not uncommon procedure for a stockholder of a corporation to personally sign a contract that the corporation enters into?

A. That is right.

Q. That is done because the person who you are contracting with is not willing to rely on the corporation?

Dep. 9-10-57 page 124 } A. In cases, but not this case. We were doing a job for a stipulated price.

Q. Who suggested the use of the word "surety" that was employed in Paragraph 6 of this agreement?

A. Who suggested it?

Q. Yes.

A. I don't know. I may have used it in drawing the contract.

Q. You were the only lawyer present?

A. Yes.

Q. You were attempting to construct this thing in a legal manner?

A. I was trying to see that Mr. Higgerson's particular ideas were incorporated about a great calamity that might be due to Mr. Enlow's negligence, and if anything happened by virtue of Mr. Enlow's negligence I would personally see to it as far as any negligence on the part of Mr. Enlow was concerned it would be taken care of.

Q. Don't you know that for a small additional amount of premium you could have covered any liability without agreeing to make yourself liable above $20,000.00, and that that could have been accomplished very easily?

A. It was to cover any particular personal liability by virtue of Mr. Enlow's negligence.

Dep. 9-10-57 page 125 } Q. You were subjecting yourself to personal judgment of maybe $50,000.00 without increasing the coverage?

A. No. I was going to cover myself for that, any negligence not covered by Mr. Enlow's insurance.

Mr. Garrett: That is all.

And further this deponent saith not.

R. A. EMANUELSON,
one of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Please state your name, age, residence and occupation.

A. R. A. Emanuelson, 159 Ridgeley Road, Norfolk, Virginia.

Q. What is your age?

A. 61.

Q. Mr. Emanuelson, what is your occupation, sir?

Dep. 9-10-57 page 126

A. Well, I have a plumbing and heating business and am in the hardware business.

Q. You are not a member of the legal profession?

A. No.

Q. Did you join in with Mr. Kesser in certain transactions involving Enlow & Son, Incorporated, as related to the contract with Higgerson Brothers?

A. Yes, sir.

Q. How long had you known Mr. Higgerson prior to meeting in Mr. Kesser's office?

A. I met him in Mr. Kesser's office. Mr. Enlow brought him up there and it was the first day I had laid eyes on him.

Q. Prior to your meeting him on that occasion were you at all familiar with the details of the proposal that was to be discussed between Higgerson, Mr. Enlow and Mr. Kesser?

A. The idea of the meeting was to make up a proposal or agreement for Mr. Enlow to do this work. That was the idea and incorporate in the agreement the amount to do this work.

Q. Did you go there wtih a completely open mind without any knowledge of the particulars?

A. I knew nothing of the particulars until the discussion took place.

Q. You signed the agreement and it was likewise signed by all parties there, Mr. Kesser, Mr. Higgerson, Mr. Enlow and yourself?

Dep. 9-10-57 page 127

A. That is right.

Q. You didn't draw the contract?

A. No.

Q. Was it drawn in your presence?

A. It was drawn during the conversation going on in the meeting and during the time the discussions were had.

Q. Have you had any legal background or training?
A. None at all unless you could get it from the sixth grade in grammar school.
Q. You didn't have your personal attorney present at that time, did you?
A. No. I didn't think it was necessary.
Q. Mr. Emanuelson, I will ask you to read silently Paragraph 6 of that contract and then I will interrogate you with regard to it.
A. All right.
Q. Have you got it in mind?
A. Yes.
Q. Now, during the course of the meeting what discussion did you have in relation to what was intended by this paragraph?

Mr. Kellam: We object to the question on the grounds that any prior discussions were merged into the contract and the contract speaks for itself. May this same objection go to all of this testimony?
Mr. Campbell: Yes.

Dep.
9-10-57
page 128 } A. Well, it was discussed about insurance on the job and we asked Mr. Higgerson what insurance he had and he couldn't tell us what he was covered on or what he was not, and he wanted to be sure that he had it covered, everything, and we agreed to go along with it, the Enlow Corporation, to that extent.

By Mr. Campbell:
Q. I ask you if Mr. Kesser or you guaranteed any funds arising out of any claim or any loss not connected with the loss arising out of the absence of insurance?
A. What was the question?

(The question was read as follows):

"I ask you if Mr. Kesser or you guaranteed any funds arising out of any claim or any loss not connected with the loss arising out of the absence of insurance."

By Mr. Campbell:
Q. With reference to this portion of the contract that re-

lates to Mr. Higgerson being entitled to secure $3,000.00 to be paid by Enlow & Son, what was the purpose behind Enlow & Son, Incorporated, making such a concession for him?

A. That was made by Enlow & Son to protect him against any loss that might come up on the job due to insurance, etc.

Q. I leave the sixth paragraph and go back to Paragraph 3 as follows:

Dep.
9-10-57
page 129 } "However, if in the event there is not a net profit at the termination of the work under this bid in the amount of $6,000.00 or over, then, in that event the sum to be received by Higgerson Brothers shall be the sum of $3,000.00 and this amount is to be received by them notwithstanding any eventuality."

If there was no profit why did Enlow & Son, Incorporated, agree to pay him $3,000.00?

A. That was—it was the idea to help him in case he went in the hole on the job, as I understand it. Maybe I don't understand you.

Q. Was there any discussion about equipment?

A. Yes.

Q. What discussion was there regarding it?

A. We had no equipment and we had to get out and hire it until we could get it and they were to pay rental on it while the job was going on.

Q. When the job was in its first stages of construction did you rent equipment from third parties?

A. Yes, had to rent equipment to get started.

Q. Was that the item or sum of $5,000.00 that has run through the course of this testimony?

A. Yes.

Dep.
9-10-57
page 130 } Q. Subsequent to having rented equipment from third parties and subsequent to the execution of this contract, was there any discussion between the parties, including Mr. Higgerson, in regard to Enlow & Son purchasing equipment and renting it on this job?

A. Yes, we had an agreement.

Q. What was it?

A. We had no equipment and we had to get it and we were

going to hire it, get it, and he was to pay all the expenses and everything else all the way through.

Q. Do you know at what time approximately the discussion occurred with Mr. Higgerson relative to equipment that had previously been rented from third people pending your acquisition of equipment? Do you recall when the discussion took place?

A. When we were trying to get into the agreement.

Q. Did you subsequently purchase equipment?

A. Yes.

Q. How long was it after the commencement of this job you got this equipment?

A. It was delivered, I think, the day after the 4th of July, the first piece of equipment, which was a wellpoint machine which we purchased from Griffin Company.

Q. What kind of equipment was it you rented for $5,000.00?

A. The same kind.

Dep. 9-10-57 page 131 } Q. When did you get that other equipment?

A. The date I couldn't tell you.

Q. Could you say it was 30 days or 60 days after the job was started?

Mr. Garrett: He has told you he can't tell you the date.

A. I don't know.

By Mr. Campbell:

Q. Approximately?

A. Approximately maybe two or three weeks, I don't know exactly.

Q. Had there been at any time any question raised by Mr. Higgerson that the rental of the equipment should not be paid by him?

A. It was understood he was to pay all the rental and he was to pay all the expenses.

Q. After having started the job on the basis of renting this equipment from third parties, was there any subsequent agreement between Enlow & Son and Higgerson that Enlow would provide this valuable equipment free of charge?

A. Absolutely not.

Q. Was there any discussion after you got this valuable equipment relative to Higgerson paying for equipment rented from third parties?

A. It was understood he was to pay for all the rental.

R. A. Emanuelson.

Dep. 9-10-57 page 132

Q. Do you recall when that discussion took place?

A. That discussion took place when we were trying to get an agreement in the office. He was to pay all rentals, insurance and what not, etc.

Q. After the equipment arrived and was put on the job was there any discussion with Mr. Higgerson in regard to his paying the rentals?

A. As far as I am concerned, I never had any talk to him at all about it then.

Q. When was the first notice you had that he was contending that he should not pay rental for that equipment that you gentlemen had acquired and put on the job?

A. After we had sent him a bill, or the corporation had sent him a bill.

Q. Did he raise any question about the rent for equipment from third persons?

A. Not as I know of.

Q. Did he at any time suggest any reason why he should expect Enlow & Son to furnish the equipment and pay the rental for it whereas he had agreed to pay the rental for equipment obtained from third persons?

A. He never talked to me about it. He never said a word to me about it.

Q. Are you aware of the reason why Enlow & Son didn't complete this job?

Dep. 9-10-57 page 133

A. Yes.

Q. What was the reason?

A. He wouldn't pay the bills and wouldn't advance any more payrolls. He refused to.

Q. Did he assign any reason for his refusal to make the payrolls?

A. He said he didn't have the money.

Q. Up until that time, to the best of your knowledge, had all the provisions of this contract been complied with by Enlow & Son, Incorporated?

A. Yes.

Q. Had there been any breach of any covenant, any of the covenants, of the agreement by Enlow & Son?

A. None that I know of.

Q. Are you sufficiently familiar with the bookkeeping on this job to know whether or not he had saved all discounts that he had obligated himself to do?

A. I never saw the books on it.

Q. So you don't know that?

R. A. Emanuelson.

A. No.

Q. I note in the third paragraph, and I will read it as a basis for my next inquiry, as follows:

"That Higgerson Brothers shall receive the sum of $6,000.00 for their part of the monies to be received under the terms of this bid from T. E. Ritter Corporation, over and above the expenses it may incur by reason of the above item in Paragraph 2 and any other item agreed upon."

Dep. 9-10-57 page 134

Other than the matter of rental of this equipment was there any other item that had been agreed upon that was not set forth in this contract?

Mr. Kellam: Same objection as noted before.

A. I don't get you.

The Commissioner: Let him read the question.

(The question was read as follows):

"Other than the matter of rental of this equipment was there any other item that had been agreed upon that was not set forth in this contract?"

(Pause).

The Commissioner: Do you want it read again?
The Witness: I want it read again.

(The question was re-read as above).

Mr. Campbell: Strike the question.

By Mr. Campbell:

Q. There is no reference to equipment in this contract as it is now written. You understand that?

A. I understand that.

Q. Was there an agreement with reference to rental of equipment pursuant to this language, "And any other item agreed upon"?

Dep. 9-10-57 page 135

Mr. Garrett: We object to that and move to strike it out

unless it was prior to or contemporaneous with the agreement.

The Commissioner: The objection is noted.

Mr. Fine: I would like to answer the objection and state this for the record, that this testimony is given in explanation of the words, "And any other item agreed upon."

By Mr. Campbell:

Q. Mr. Emanuelson, during the time that this contract was entered into were you not familiar with the details of the contract to be performed?

A. Yes, as they explained it to me.

Q. I mean prior to the explanation that you got from Mr. Higgerson as to the job?

A. No.

Mr. Garrett: He didn't say he got it from Mr. Higgerson and I object to leading.

By Mr. Campbell:

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Q. From whom did you get the details as to the job to be performed?

A. I got them first from Mr. Enlow. We had the job incorporated and discussed it and arranged for a meeting at Mr. Kesser's office. That is the first I knew about it.

Q. Prior to your meeting in Mr. Kesser's office, other than knowing there was a job to be entered into by way of a contract, did you know what specifically was to be done?

A. No.

Q. Did you find out at the meeting the nature of the work to be performed?

A. I knew it was a drainage system but what was done or what was to be done I didn't know because I hadn't seen the plans.

Q. What, if anything, did Mr. Higgerson have to say with reference to the amount of profit that he had in the job?

A. In the discussion—

Mr. Kellam: We object to that.

A. (Continuing) It was stated there would be $20,000.00 and Mr. Enlow stated he thought it would be some $12,000.00, and $6,000.00 would be for the corporation and $6,000.00 for Higgerson, if it showed that profit.

R. A. Emanuelson.

By Mr. Campbell:

Q. Anything else?

A. If it didn't show that profit it would be split right down the line and Higgerson was to get the first $6,000.00 if it showed a profit, and if it didn't, then—that was the way it was, $6,000.00, and if it showed a loss Enlow Corporation was to pay $3,000.00 for the loss, that we would guarantee that.

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Q. When you say "we," of whom are you speaking, the Enlow Corporation?

Mr. Garrett: I object to leading the witness.

Mr. Campbell: Let me finish my question.

Mr. Garrett: I object to Mr. Campbell mentioning names of people he wants him to use.

Mr. Campbell: I am going to ask the question.

By Mr. Campbell:

Q. You used the term "we." I ask you now whether you meant Enlow & Son or whether you meant you and Mr. Kesser?

A. Kesser and I guaranteed Enlow & Son would pay it. That is the way I saw it.

Q. Enlow?

A. Enlow, not he and I. We backed the Enlow Corporation to that extent.

Q. That Enlow would pay it?

A. Enlow, and that was insurances, etc., he didn't carry.

Q. At that time was there any discussion as to the rental of equipment that you proposed to buy?

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A. Yes.

Q. Did the income that Enlow & Son expected to realize from this equipment enter into the reason for your guaranteeing the $3,000.00?

Mr. Kellam: We object to that on the ground it is leading, and secondly it is an attempt to contradict the written contract, and if it was prior to the contract it is merged in the written instrument.

Mr. Campbell: I will reframe the question.

By Mr. Campbell:

Q. What part, if any, did the income that Enlow & Son expected to get from the rental of equipment play in the commitment of $3,000.00?

R. A. Emanuelson.

Mr. Garrett: I object to that on the grounds there is no basis for the question as to what income was to be gotten, and it is an attempt to vary the terms of the contract.

A. The whole thing was rental of equipment, the amount of money that we would get from it, and as far as any loss actually had we would still have that much coming in to us.

Mr. Campbell: You may cross examine.

CROSS EXAMINATION.

By Mr. Garrett:

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Q. I take it you are experienced in work of the kind that has been discussed here?
A. I am experienced in the contracting game and been in it all of my life about.
Q. That is how many years?
A. Since 1919.
Q. I presume your experience has been varied and it has not been devoted to any particular type of construction?
A. Primarily plumbing and heating.
Q. Pipes, drainage, etc., are right down your alley?
A. Yes.
Q. Enlow & Son was set up in the early part of 1955?
A. Yes.
Q. What position did you hold in it?
A. I think I was treasurer. I haven't been into those papers for a long time.
Q. Somebody else has testified about that. Mr. Kesser was secretary?
A. Yes.

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Q. Mr. Enlow was president?
A. Yes.
Q. You and Mr. Kesser put the money in the corporation?
A. Yes, we put some.

Q. You and he were the sole stockholders?
A. In a way, yes.
Q. You own stock, you and Mr. Kesser?
A. Yes.
Q. It was an adventure projected for profit?
A. That is the only time I go in business, for a profit.
Q. When you entered into arrangements for this work you, of course, were interested to some degree in the likelihood of the success of it?
A. Yes.
Q. And you had Mr. Enlow more or less manage the enterprise?
A. He was going to be the operating head. He had the know-how. I had never had any experience in that kind of work.
Q. You were more or less placing some reliance on the president in the matter of contracts? You relied on him to some extent?
A. Yes.
Q. You have to make some investigation before you can reach an agreement?
A. Yes.

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Q. Mr. Enlow had the same conversation with Mr. Higgerson that he had with you?
A. He probably did, I don't know.
Q. When you walked in the meeting you were not going to be exclusively guided by conversation of another party, but were going to rely somewhat on your own judgment?
A. Yes.
Q. Mr. Enlow, you and Mr. Kesser had as much time as you wanted to execute the contract?
A. We had enough time.
Q. Nobody was pushing you?
A. No.
Q. Nobody said you could not examine the contracts relative to this thing, referring to Enlow's contract and the State contracts?
A. No.
Q. Nobody was pressing you and saying it had to be signed at that particular instant?
A. No. We wanted to get it over with. We wanted to get going.
Q. It was considered to the mutual benefit of all to go ahead and execute the agreement?

R. A. Emanuelson.

A. Yes.

Q. As a businessman you recognized the desirability of having written instruments?

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A. Yes. Lots of times I don't have written agreements.

Q. You knew Mr. Higgerson about a half hour?

A. Yes.

Q. And after a half hour with him, making his acquaintance, you could rely on him to the extent of entering into a written agreement, and it didn't strike you as being unusually quick?

A. This one was because the Enlow Corporation was going to do the work.

Q. You were a member of the corporation, a stockholder?

A. Yes.

Q. And if there was to be a profit you were to be a beneficiary?

A. I hoped to.

Q. You were not disinterested?

A. I was not.

Q. Having known him about 30 minutes or less you proceeded to formulate the written terms of this agreement?

A. Yes.

Q. It didn't come to you as an inspiration but as a result of discussion back and forth?

A. Yes, we discussed it back and forth naturally and put down notes as we went along.

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Q. And each party would suggest the insertion of some paragraph or another?

A. Yes.

Q. Mr. Kesser was the only lawyer present?

A. Yes.

Q. Did Mr. Kesser ever represent you in any matters?

A. No. Mr. Campbell is my attorney.

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Mr. Kellam: We introduce a letter dated September 5, 1957, from the Executive Secretary of the State Registration Board for contractors, Commonwealth of Virginia. There is no objection from counsel for the defendants, I believe. Am I right in that?

Mr. Campbell: Correct.
Mr. Fine: You are.
The Commissioner: It will be received and marked Plaintiff's Exhibit No. 15.

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C. EDGAR WINN,
called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:

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Q. Please state your name, age, residence and occupation, Mr. Winn.
A. C. Edgar Winn, 63 or 64, something like that, anyhow over 21. My residence is Virginia Beach, Princess Anne County, where I vote and live.
Q. You are in the insurance business?
A. Yes.
Q. And the name of your firm?
A. Mutual Insurance Agency of Norfolk, Incorporated.
Q. I believe it was your business as agent to write certain insurance for Higgerson Brothers.
A. That is right.
Q. Pursuant to an order of this court you were ordered to bring your insurance records in connection with insurance that you had on the project which is the subject matter of this suit; is that correct?
A. Yes, sir.
Q. Will you refer to your records indicating the insurance you wrote for them, the amount and dates, and the amount of the return of dividend? Do you have a copy there?
A. I have several copies. You may have one.
Q. Now, referring to the record you have, did you write compensation insurance, Workmen's Compensation?
A. Yes.

C. Edgar Winn.

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Q. That Workmen's Compensation, what jobs did it cover?

A. It covered any job he had. In other words, compensation, Workmen's Compensation policies cover any employee they have at any time. You could start out with ten employees and wind up with a hundred or a thousand, and they would still be covered.

Q. Have you broken down your Workmen's Compensation with regard to this specific job?

A. No, not on this specific job because it would be almost impossible. That premium is based on a payroll audit. If a man—it is written on an annual basis. During that time that man may have four or five jobs and each job will be audited to the individual company.

Q. I take it you don't have a breakdown on this specific job on the project known as No. 1864-70-72 Gosport Road and High Street.

A. Not a specific audit on that, no.

Q. Can you tell us whether or not you have any memorandum of how many employees were on that job?

A. No, we wouldn't have that.

Q. Can you tell us how much the payroll was on this job?

A. Not on that particular job.

Q. Can you tell us when this payroll ceased on this job so far as your insurance is concerned?

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A. No.

Q. Referring again to Workmen's Compensation, you have no breakdown whatsoever as to this particular job?

A. That is true.

Q. Do your records indicate when Workmen's Compensation ceased on this job?

A. No.

(Off record discussion).

By Mr. Fine:

Q. So far as any insurance is concerned on this job, you had none on there for Enlow and Son, Incorporated, or premiums returned to Higgerson Brothers; is that correct?

A. We never have written a policy for that firm.

Q. You never did any business with them?

A. No.

C. Edgar Winn.

Q. That you know of.
A. Not that I know of.
Q. Enlow and Son would not be covered on a policy written to Higgerson Brothers?

Mr. Kellam: I object to that. That is an interpretation to be made by the Court.

By Mr. Fine:
Q. You had nothing to do with Enlow and Son whatsoever?
A. No relations with them. I didn't know there was such a firm in existence.

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I might add in any work Higgerson Brothers were doing for any firm their employees would be covered.

Q. Higgerson Brothers?
A. Yes.
Q. But so far as Enlow and Son were concerned, their employees would not be covered by anybody?
A. No, not unless they were on the payroll.
Q. In connection with liability insurance, will you state whether or not you had any liability insurance that was written for Enlow and Son, Incorporated?
A. We didn't.
Q. Did you have any liability insurance written for Higgerson Brothers that covered Enlow and Son, or any rider or endorsement on the policies?
A. I don't recall. I will check the policy and see if I have an endorsement. We don't have any for Enlow and Son.
Q. I would like for you to state specifically whether or not your records show any coverage for Enlow and Son, Incorporated.

Mr. Kellam: Same objection. It is a question for the Court. The Court has to interpret those policies.

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Mr. Fine: We submit it is purely a factual matter as to whether they have any coverage. As to the legal question, that would be for the Court to determine.

The Commissioner: An objection and exception is noted.

C. Edgar Winn.

A. I don't see any records so far of any coverage for Enlow and Son.

By Mr. Fine:

Q. I take it, so far as your records are concerned and your individual memory you have no rider or coverage for Enlow and Son so far as liability is concerned.

A. No.

Q. You have just handed me a copy of a memorandum, of which Mr. Kellam has a copy. This memorandum which you have typed indicates what premiums have been paid on Workmen's Compensation for the employees of Higgerson Brothers.

A. That is true.

Q. That also covers Higgerson Brothers from 1954 through 1957?

A. Yes.

Q. The premiums named here are figured from February 15, 1954, to February 15, 1957, for Workmen's Compensation and General Liability Insurance.

A. Yes.

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Q. Tell us whether or not you wrote any liability insurance to cover equipment that was being used on this particular job.

A. There is automobile insurance. Any other equipment?

Q. Yes.

A. That covered any equipment owned by Higgerson Brothers.

Q. That covered equipment and automobiles both?

A. Yes, also manufacturer's and contractor's general liability.

Q. You have a copy of that policy?

A. Yes, I have a copy of the policy here.

Q. You have itemized the equipment?

A. Yes.

Q. I would like to ask you to let us have that as I want to introduce it, and we can return it at a later date.

A. We don't keep them all of that time because when a policy expires—they are written on an annual basis, and we keep them for a couple of years. I have a record of the policy numbers.

Mr. Fine: I will ask Mr. Kellam to let us have the originals of these policies to be introduced in the record.

C. Edgar Winn.

Mr. Kellam: We have already put in all the originals we have.

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Mr. Fine: They are not all.

Mr. Kellam: We don't have them then.

Mr. Fine: Let me have what copies you have and I will introduce them.

Mr. Kellam: Here is Plaintiff's Exhibit 5, policy No. WC-365790, issued in the name of Higgerson Brothers for a period from February 15, 1955, to February 15, 1956. Exhibit No. 7, policy No. 387354, covering period February 19, 1956 to February 19, 1957.

Policy No. CGL-6015, issued to Higgerson Brothers covering a period of February 15, 1955, to 1956, which is a general liability policy. Exhibit No. 2, which is certificate of insurance already in evidence.

By Mr. Fine:

Q. I hand you Exhibit 5 and ask you what was the dividend on that policy returnable.

A. This policy is for 1955 to 1956, Workmen's Compensation policy.

The dividend was $60.99. No, wait a minute. This policy was $174.80.

Q. All right, sir.

A. $174.80.

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Q. That refers to policy 365792. That is for Workmen's Compensation?

A. Yes.

Q. And employer's liability.

The policy itself shows employer's liability for only $25,000.00.

A. Employer's liability $25,000.00, yes.

Q. That is the same premium annually?

A. (Affirmative nod). It graduates up.

Q. I also refer you to Exhibit 7 and ask you if the liability on that was $25,000.00?

A. That is true.

Q. And the return premium on that policy was how much, that being 1956 to 1957?

The Commissioner: Policy 387354, the return was $107.50.

By Mr. Fine:

Q. State why there was a return on that.

A. His deposit premium was $927.26, and that was an

estimate of the payroll, what the payroll would be, and when the audit came through the payroll didn't amount to as much as the deposit premium, therefore he was given a credit.

On the other policy it exceeded the amount of the estimated payroll and we charged him an additional premium based on the payroll.

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Q. I refer you to Defendant's Exhibit 2, certificate of insurance, and ask you if this certificate of insurance had anybody on there as Enlow and Son?

A. No, sir.

The Commissioner: That was exceeded.

By Mr. Fine:

Q. I refer you to Plaintiff's Exhibit No. 6 and ask you who this policy was issued to, the date it was issued, and ask you who was covered on that?

A. Higgerson Brothers.

Q. Harold and Ivan Higgerson, trading as Higgerson Brothers?

A. Yes.

Q. And the date of the issuance of that?

A. February 15, 1955, to 1956.

Q. When the award of this State job was issued in May, 1955, your policy had already been issued before May, 1955?

A. Yes.

Q. Have you ever been requested for an endorsement on this policy in favor of Enlow and Son?

A. Not that appears there on.

Q. You have no record of having issued an endorsement on that policy?

A. No.

Q. What was the return on the policy, can you state, the return from February, 1955, to February, 1956?

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A. That is not compensation, is it?

Q. No.

A. The dividend—the total dividend was $123.00 plus $29.88, it looks like, $152.88.

Q. I may be in error, but I want to bring this to your attention; according to your memorandum it was $1,548.09 and your return premium was $128.84, and dividends $301.72.

A. Which is that?

Q. From February 15, 1955.

A. That is true.
Q. I take it the dividend was $301.72?
A. Yes.
Q. And the return premium on automobiles was $128.84?
A. Yes.
Q. Making total return premium and dividends of $430.56?
A. That is correct.
Q. Making a net cost of $782.20?
A. That is true.

The Commissioner: Give us the policy number.
Mr. Fine: Policy No. CGL-6015, marked as Plaintiff's Exhibit 6.

By Mr. Fine:

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Q. I refer you to return premium on automobile. Can you tell us what that is?
A. I could not. The only thing I can say is I don't know.
Q. If any equipment was covered on this job it would be in this policy mentioned, Plaintiff's Exhibit 6.

Mr. Kellam: That is a question for the Court.

A. Not necessarily. It may be coverage on any equipment he may acquire that would be covered.
Q. That is in the policies you mentioned?
A. Yes.
Q. And you say from your experience as an insurance agent that if Higgerson Brothers were not operating it, would sublet it to another job under different supervision to people it didn't belong to, that this equipment would be covered?
A. I would say it is a legal question.

Mr. Fine: I would like to introduce this as Defendant's Exhibit 1.
The Commissioner: Defendant's Exhibit 1, December 12, 1957.

By Mr. Fine:

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Q. Have you ever been requested by Higgerson Brothers or anyone in their behalf, or by Enlow and Son to prorate the insurance on this policy or policies as to any job during any period?
A. Not to my recollection. If we had been requested the records would show. I could check

and see. As I said, to my personal knowledge, I couldn't say yes or no.

I have no recollection of a special audit, but if there has been I will be glad to furnish it.

Q. I will ask you to be good enough to call your office and ascertain that so you can affirmatively answer it.

A. All right. Shall I do it now?

Q. We can do it later. I would like to introduce these records as a Defendant's Exhibit.

Mr. Kellam: They are already in evidence.

Mr. Fine: These haven't been introduced.

Mr. Kellam: I would like to see them.

The Witness: They are current policies.

Mr. Kellam: We object to the introduction of the policies only because they cover a period from February, 1957, to February, 1958, and they are immaterial as to the period involved here.

Mr. Fine: They are very material in order to show that these policies in 1957 and 1958 are identical with the policies in 1955 and 1956, and this insurance was never intended to cover the Enlow job, but were issued in February, 1955 and award of the job was not made until some time in May, 1955, and if the insurance didn't cover it that was their liability.

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The Commissioner: The objection is noted, Is this one exhibit, Mr. Fine?

Mr. Fine: Let's make them 2 and 3.

The Commissioner: Document No. WC-388195 will be received and marked Defendant's Exhibit 2, 12/12/57.

Document No. CGL-110960 will be received and marked Defendant's Exhibit 3, 12/12/57.

By Mr. Fine:

Q. Mr. Winn, as I understand it you didn't furnish the bond in this case or have anything to do with that; that was done by Mr. Page's office?

A. Yes.

Mr. Fine: That is all.

CROSS EXAMINATION.

By Mr. Kellam:

Q. Without waiving my objection, you were asked by Mr.

C. Edgar Winn.

Fine in connection with Plaintiff's Exhibit 5 which is policy No. WC-365792. The limits under the Workmen's Compensation payments were in the sum of $25,000.00? The policy speaks for itself.

Dep. 12-12-57 page 164 } A. There is no limit under the Workmen's Compensation policy as such.

Q. The policy requires them to pay as shown under the Workmen's Compensation law?

A. Yes. The $25,000.00 figure is what is known as Coverage B, employer's liability, and it has nothing to do with compensation.

Q. Does that policy cover any except the contract for Higgerson Brothers?

Mr. Fine: I object to that as a legal question for the Court to determine.

A. May I answer that?

By Mr. Kellam:

Q. Yes.

A. Workman's Compensation policy covers anyone who is employed by Higgerson Brothers, I would say directly or indirectly.

Q. As to the liability policy, is it not a fact that covers any claim of liability for which Higgerson Brothers would be liable on any of its employees?

A. Definitely.

Q. Does that also cover subcontractors for which they would be responsible?

A. Definitely.

Mr. Kellam: That is all.

Dep. 12-12-57 page 165 } RE-DIRECT EXAMINATION.

By Mr. Fine:

Q. That liability on these policies is dependent on whether Higgerson Brothers are responsible?

A. Yes.

Mr. Kellam: I object to that. That is a question for the Court to determine.

C. Edgar Winn.

By Mr. Fine:

Q. On the basis of their own policy, the total liability for employer liability on this job is $25,000.00?

A. No, $100,000.00.

Mr. Kellam: Mr. Fine, you are referring to Workmen's Compensation policy.

Mr. Fine: No, I didn't say that.

By Mr. Fine:

Q. The employer's liability which is covered under B is $25,000.00?

A. Yes.

Q. Would not the liability so far as employer's liability is concerned be under Coverage B in excess of $25,000.00?

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A. Not under the Workmen's Compensation?

Q. It covers liability under the Workmen's Compensation of how much?

A. Liability under the Workmen's Compensation policy is under the laws of the State Corporation Commission. We don't know exactly the limit so far as we are concerned. It comes under the laws of the Industrial Commission.

Q. If there is no employer's liability under the coverage, you are limited to $25,000.00?

A. Under that the employer's B the limit is $25,000.00.

Q. That is correct?

A. That is true.

Q. Let's get Employer's B. "Limit of liabilities for Coverage B. Employer's Liability $25,000.00, subject to all the terms of this policy having reference thereto."

That is all under the Workmen's Compensation Commission?

A. Yes. They could not increase that. That is the State law.

Q. Now, so far as this policy is concerned it covers the employees of Higgerson Brothers in connection with or arising out of Workmen's Compensation?

A. That is Workmen's Compensation.

Q. If an employee on this job was hurt by Enlow and Son, as to whether he would be covered under that is a legal question.

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A. That would be, yes.

Q. Referring to general liability that is involved, that involves the coverage of automobiles,

bodily injury and property damage, that covers property damage under your M and C form?

A. That is automobile form you are referring to?

Q. Yes.

A. The coverage is in the amount of $100,000.00 and $300,000.00. That is general liability coverage, including manufacturer's and contractor's liability.

Q. In connection with street or road construction on Item 3, that is to be separately rated?

A. Yes.

Q. I refer you to policy that has been introduced, February 15, 1955—February 15, 1956, Plaintiff's Exhibit 6, and ask you if you had any rating on this policy in connection with work done on Route 17 and Route 337, Gosport Road in the City of Portsmouth?

A. I don't have any particular knowledge of the rating. The auditor's come in to Higgerson Brothers and check their books at the end of the year and they rate the premium according to whatever work that has been done.

Q. It says on there, "Subject to audit?"

A. That is true.

Dep. 12-12-57 page 168 } Q. Referring to the same policy and to your memorandum, 1954 to 1955—no, February 15, 1955, to February 15, 1956, and that is the second item—

A. That is right.

Q. You returned a premium on the automobiles as you stated?

A. Yes.

Q. Of $664.67?

A. Yes.

Q. Can you tell us what that audit covered?

A. No.

Q. You don't know?

A. No.

Q. And you don't know what the particular jobs were?

A. No, I have no idea.

Mr. Fine: That is all, sir.

Mr. Kellam: I have nothing further. And further this deponent saith not.

ALBERT KOURI,

called as a witness on behalf of Enlow and Son, having been first duly sworn, was examined and testied as follows:

Albert Kouri.

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page 169 } DIRECT EXAMINATION.

By Mr. Fine:

Q. State your full name, your age, residence and occupation.

A. Albert Kouri, 46 years old, and I live at Cavalier Park, Virginia Beach.

Q. Your occupation?

A. Vice President of the Vanguard Construction Corporation.

Q. Mr. Kouri, will you please refer to your records and indicate what connection Vanguard Construction Company have with the work on Route 17 and Route 337, Gosport Road, Portsmouth, in 1955?

A. I don't think I was connected with it.

Q. Nowhere were you connected with it?

A. On June 7, 1956.

Q. How did you come to get into the job, the circumstances?

A. Mr. T. E. Ritter asked us to cut a section of storm sewer lines which we did on June 7th. On June 7th we gave them a written proposal.

Q. The first time you had been asked to do that was June 7, 1956?

Dep.
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page 170 } A. No, I was asked to do it, I would say, a week previous to that.

Q. Within a week?

A. Yes.

Q. What was your proposal on that job, do you have a copy of it?

A. Yes.

Q. Let me have it, please, sir.

A. That is a photo from the original.

Q. Did you do the work as indicated on that proposal?

A. Yes.

Q. In June, 1955, did you do it on that contract?

A. Yes.

Q. That was your accepted proposal?

A. Yes.

Mr. Fine: I would like to introduce that, may it please the Court.

Mr. Kellam: We have no objection to it's introduction but would like to know what connection it has with the matters in issue here.

Albert Kouri.

Mr. Fine: I am going to bring it out.
Mr. Kellam: I think it ought to be done before it is introduced.
The Commissioner: Do you want to withdraw it first?
Mr. Fine: Yes.

Dep.
12-12-57
page 171 } By Mr. Fine:
Q. Tell us, please, what particular work you did.
A. We put in 828 lineal feet of 42 inch reinforced concrete pipe, 6112 cubic yards of concrete, and 2 standard manholes.

(Off record discussion).

By Mr. Fine:
Q. Was that in addition to the work that had been abandoned on the job?
A. I don't know.
Q. Anyhow it was on this particular job?
A. Yes.
Q. Was it new work or a continuance of old work?
A. I don't think I can answer that question because I don't know the details.
Q. But you did the work on the job? I think it is a fact and that is what the testimony showed, that Vanguard did it.
We will have the man here unless you can concede this work was completed by Vanguard.

Mr. Kellam: I don't know what you are talking about. If the record shows it, that is sufficient.

A. We were told to put the sewer line in, which we did.

Dep.
12-12-57
page 172 } Mr. Fine: I will be glad to show my friend the record and the testimony of Mr. Hodges. I don't care to take up too much time.
Mr. Kellam: Go right ahead.

By Mr. Fine:
Q. Based on what you did on that job, how much was it in dollars and cents?
A. $17,433.28.

Albert Kouri.

Q. Who paid that to you?
A. Mr. T. E. Ritter.
Q. Then, as I understand your contractural relations on this job were not with Higgerson Brothers but were with the General Contractor, T. E. Ritter and Company?
A. Yes.
Q. After you started on this job—you commenced work on what date?
A. We commenced work on the 6th of July, 1956, actually moved out to the job on that date.
Q. That is July, 1956?
A. Yes.
Q. Were you called upon to do this at any earlier date than July 6, 1956?

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A. Yes.
Q. You were called upon to do it before that?
A. Yes, but we didn't have our equipment available at that time and Mr. Ritter said it would be all right.
Q. You told him you would not be able to do the job before July 7th?
A. We signed the contract and we told him as soon as we got through with another job we would move the equipment.
Q. Did you represent to him you would get on the job within a week or ten days?
A. I can't remember that.
Q. Was there any date of the commencement in your proposal?
A. No.
Q. Did he ask you before July 7th to commence?
A. Yes, he called me and I explained the circumstances.
Q. Did he ask you to do it prior to July 7th, 1956?
A. Just a telephone call.
Q. The reason you didn't start before that date is because you didn't have the equipment?
A. That is right.
Q. To do it with?
A. Yes.
Q. Did you, or not, tell Mr. Ritter that you could not start it before that time on account of your equipment?
A. Yes, sir.

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Q. Were you told, or not, that the job was in default?
A. No.
Q. And that he was anxious to complete it, Mr. Ritter?

Albert Kouri.

A. No, I don't remember that.
Q. You don't remember that?
A. No, sir.
Q. Did he tell you he had a deadline to meet on this job?
A. No.
Q. He didn't tell you that?
A. No.
Q. As I understand from your proposal it was to take care of approximately six items and he would pay you so much per foot?
A. Yes.
Q. Were you consulted with regard to how this would fit in with the master plan?
A. No.
Q. He told you he wanted so many feet of pipe put in?
A. Yes.

Mr. Fine: I would like introduce that as Defendant's Exhibit 4. I think it is.
The Commissioner: Received and marked Defendant's Exhibit 4.

Dep. 12-12-57 page 175 } By Mr. Fine:
Q. Did you know whether Enlow and Son had any dealings on this job?
A. No, I didn't.
Q. Did T. E. Ritter pay you for this?
A. Yes.
Q. Did he pay you as the job progressed?
A. Yes.
Q. Will you give us the dates of the payments on the job?
A. You want each one?
Q. Please.
A. On July 20 he paid us $2715.92, on September 20 he paid us $6592.18. I am sorry, I skipped one. On August 20 he paid us $554.09, on October 21 he paid us $540.00, and on January 31, 1957, he paid us the final payment, which made up the $17,433.28.
Q. Mr. Kouri, did you represent to the T. E. Ritter Company when you would complete the job?
A. No, sir.
Q. I take it your proposal was based on your doing it within a reasonable time.
A. Yes.
Q. Without the necessity of any overtime work?

C. Edgar Winn.

A. Yes.

Dep. 12-12-57 page 176 } Q. Do you know whether or not the Ritter Company told you this was extra work on the job?

A. They didn't tell me that.

Q. They just told you to bid on it? Let me ask you this: your bid on this, on the pipe, was less than the other man's because of the increased number of feet you put in as against what he bid on?

Mr. Kellam: I object to the question as leading and suggesting an answer.

By Mr. Fine:

Q. In bidding, state whether or not consideration is given as to the number of feet done on the job as compared to a small or large amount.

A. Yes.

Q. The larger the amount—

Mr. Kellam: I object to the question as leading.

A. It would be a consideration.

By Mr. Fine:

Q. That is taken into consideration?

A. Yes.

And further this deponent saith not.

Dep. 12-12-57 page 177 } C. EDGAR WINN,

a witness herein, having been previously sworn and examined, was recalled for further examination and testified as follows:

DIRECT EXAMINATION (Rec).

By Mr. Fine:

Q. All right, Mr. Winn.

A. There is no record, we don't have any records of all the old policies. In other words, we don't have the capacity for keeping them. We destroy them because they clutter up the files.

There is no record, as far as I can remember from this account of where Enlow—any endorsement was ever made in connection with any policies for Enlow and Son.

Q. Your memory is that no endorsement was made to Enlow and Son?

A. Yes.

And further this deponent saith not.

Dep. 12-12-57 page 178

R. LEE PAGE,

called as a witness on behalf of Enlow and Son, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:

Q. You are Mr. R. Lee Page?

A. Yes.

Q. Please state your age, residence and occupation.

A. I don't know that my age is necessary, but seventy, insurance and bonds, Pocahontas Drive, Virginia Beach is my residence.

Q. In your capacity and association with R. Lee Page Company did you, or not, write the performance bond furnished by Higgerson Brothers to T. E. Ritter?

A. Yes.

Q. Will you state the date of that, please, sir.

A. The 12th day of August, 1955.

Q. As I understand it, the original contract, original bond, was held by T. E. Ritter Corporation. The contract or bond of T. E. Ritter Corporation and Higgerson Brothers was dated June 27, 1955.

A. According to that, yes.

Dep. 12-12-57 page 179

Q. Now, I ask you if there was ever any endorsement of this bond involving any interest of Enlow and Son, any interest they had with Higgerson Brothers or T. E. Ritter Corporation?

A. No, it wouldn't be possible to endorse the bond. It would have no bearing whatever. This is the bond that we guarantee that Higgerson Brothers would perform the contract which they undertook with T. E. Ritter Corporation.

Q. This is the only bond, I believe, that you know of in this case?

A. It depends upon what you mean by "In this case." We

R. Lee Page.

executed a bond for T. E. Ritter with the State Highway Department.

Q. Performance bond?

A. Yes, written in the Continental Casualty Company.

Q. The only bonds that you recollect in this case, so far as you know, was one with the Massachusetts Bonding and Insurance Company, and the Continental Casualty Company?

A. One with T. E. Ritter Corporation and one for Higgerson Brothers to Ritter.

Q. What was the premium on that bond?

The Commissioner: Speaking of the Higgerson-Ritter bond?

Mr. Fine: Yes, your Honor.

A. $659.61.

Dep. 12-12-57 page 180

Q. The contract price between the T. E. Ritter Corporation and Higgerson Brothers was $87,948.30 originally?

A. That is the original price. Of course, in this case if the amount of this contract was increased we would be entitled to bill Higgerson Brothers for the additional premium.

The application Higgerson Brothers signed for this bond carries a stipulation that in the event of any increase in the amount of the contract that the bond covers the additional work and that the bonding company would be entitled to an additional premium.

Q. Do you have that application?

A. No, sir. That is in the home office. I can furnish you with a copy.

Mr. Fine: I would like to ask you to do that and we will have it marked as Defendant's Exhibit 6.

Mr. Kellam: It will be agreeable to have him send it to the Commissioner.

The Commissioner: Do you want to stipulate that this application will be mailed to me and marked as an exhibit?

Mr. Kellam: Yes, sir.

Dep. 12-12-57 page 181

Mr. Fine: I would also like to introduce this as Defendant's Exhibit 7 (handing paper to the Commissioner).

The Commissioner: It will be received and marked as Defendant's Exhibit 7.

R. Lee Page.

By Mr. Fine:

Q. Have you been paid the premium on that bond?

A. Yes, sir.

Q. Who paid you?

A. Higgerson Brothers.

Q. Would you let me look at your memorandum there, please, sir?

A. Yes. That is the report of the execution of the bond.

Q. I believe, sir, Mr. Page, the report was made to you on July 24, 1956, by Mr. Hodges who is connected with Higgerson Brothers, and shows that the job was ninety-eight percent complete.

A. If that is on there it would probably be correct, yes.

Q. And there was owing $1800.00 due on the $88,000.00?

Mr. Kellam: We would like for the record to show Mr. Fine is reading from a memorandum made by Mr. Page.

The Witness: No. That is not my writing. I don't write that good.

Dep. 12-12-57 page 182

Mr. Kellam: We have no particular objection to it except that the statement of Mr. Fine that Mr. Hodges is connected with Higgerson Brothers is not a correct statement. He is just an accountant and anything written on that memorandum by him would be hearsay.

Mr. Fine: The evidence in this case shows the position Mr. Hodges took in this case and it speaks for itself without further argument, and we do represent Mr. Hodges is fully familiar with the facts in this case.

Mr. Kellam: We contend he is not.

By Mr. Fine:

Q. Do you have to have that for your records?

A. I would like to have it. If you want me to I will photostat it and send it in with the application.

Q. That notation is just as the job progressed, and is the progress item; is that correct?

A. I presume so, yes.

The Commissioner: Is there a stipulation on this exhibit?

Mr. Kellam: Yes, sir. It is agreeable that Mr. Page may photostat it.

The Commissioner: Let's identify it, if you will. Exhibit

Dep. 12-12-57 page 183

which is headed Massachusetts Bonding and Insurance Company, daily report, H. O. 5, number C-789378—

The witness: I don't know whether my photostat will bring out that writing.

The Commissioner: Dated August 15, 1955, which will be photostated and mailed to the Commissioner, and will be received and marked Defendant's Exhibit 8.

Mr. Fine: Let's stipulate further that if *he* photostat doesn't carry the ink on it we can insert it in the memorandum.

Mr. Kellam: It is perfectly agreeable for him to type it on a form. Anything he does will be all right.

By Mr. Fine:

Q. Mr. Page, did you recognize Enlow and Son in connection with this job?

Mr. Kellam: Objected to as immaterial, if the Commissioner please.

A. Mr. Fine, I know that Enlow and Son worked on the job. We have no control over what Higgerson Brothers does with their jobs. They could sublet them two or three times. We are bound by the contract executed by Higgerson Brothers to see that it is carried out, whether Enlow and Son were interested, or not.

Dep. 12-12-57 page 184

Of course, I know of certain matters in connection with it, but it has nothing to do with this bond.

Q. I take your answer to be you stood on the contractual matter between Higgerson Brothers and the Bonding Company, and T. E. Ritter and the Bonding Company only.

A. Repeal the question.

(The question was read as follows):

"Q. I take your answer to be you stood on the contractual matter between Higgerson Brothers and the Bonding Company and T. E. Ritter and the Bonding Company only."

A. I was in this position: I had a bond for T. E. Ritter Corporation, and we have been doing his business ever since T. E. Ritter—for three years, and I had a bond with Higgerson Brothers, and they were good customers of mine and I was endeavoring to prevent any trouble between two good cus-

tomers, and I had quite a few conversations with both Mr. Ritter and Mr. Higgerson.

It has nothing to do with our liability under this bond, however.

Q. You would not have written a bond with Enlow and Sons who were not registered contractors?

Mr. Kellam: I object, if the Commissioner please, as being immaterial.

A. Do I have to answer that?

Dep. 12-12-57 page 185 } The Commissioner: I think he has already said he didn't write it for Enlow and Son but Higgerson and Ritter.

Mr. Fine: All right. May Mr. Page be excused?

Mr. Kellam: As far as I am concerned. For the record, it shows that Enlow and Son were registered contractors.

Mr. Fine: Let the record show that when they entered into the contract they were not, and my friend is encumbering the record with argument which should come at a later time. And further this deponent saith not.

R. E. RITTER,

called as a witness on behalf of Enlow and Son, having been first duly sworn, was examined and testified as follows:

Mr. Fine: I think Mr. Spencer Gill is here on behalf of the T. E. Ritter Corporation.

Mr. Gill: I am here to see what is going on. I am not a party to the controversy.

Dep.
12-12-57
page 186 } DIRECT EXAMINATION.

By the Commissioner:

Q. State your name, please.

A. T. E. Ritter.

By Mr. Fine:

Q. Will you state your full name, age, residence and occupation, please, sir?

A. Thomas Edward Ritter.

Q. Your age and residence?

R. E. Ritter.

A. Sixty-six, 1319 Bolling Avenue.
Q. Occupation?
A. Contractor.
Q. With what company are you?
A. T. E. Ritter Corporation.
Q. What is your position with that corporation?
A. President of the corporation.
Q. I hand you Defendant's Enlow Exhibit 1 dated May 30, 1957, and ask you if that is his proposed contract and bond for the State Highway Department, Route 17-A, Route 17 and 337, Gosport Road, City of Portsmouth.
A. I expect that is it.

Dep. 12-12-57 page 187

Q. All right.
A. That is a copy, is it?
Q. Yes.
A. Yes.
Q. I want you to identify it.
A. All right.
Q. You had a contract, did you not, with Higgerson Brothers for certain work.
A. That is right.
Q. And that is contained in this memorandum here, Defendant's Exhibit 1?
A. Yes.
Q. How much was your contract with Higgerson Brothers?

Mr. Kellam: The contract is in evidence and speaks for itself.
Mr. Fine: I will handle my case.
Mr. Kellam: I have a right to make an objection. I say the record speaks for itself and I object to his question of the witness as to its contents.
Mr. Fine is a little touchy today.
Mr. Fine: It is well settled that you may interpose objections in connection with your case which are relevant.
My friend may interpose any objections he wishes, and it is also well settled that the defendant may make his defense and present his claim in his own way.

Dep. 12-12-57 page 188

By Mr. Fine:
Q. What was the contract?
A. The contract—Mr. Gill has a copy of the contract right here.

R. E. Ritter.

Q. This is the original contract?
A. Yes.
Q. And the bond that was furnished by Higgerson Brothers?
A. That is right.
Q. To you?
A. Yes.

Mr. Fine: I would like to introduce that, may it please the Court.
Mr. Gill: That is our only copy of that.
Mr. Fine: If it can be stipulated that is the contract we will return it to you.

By Mr. Gill:
Q. Do you have a copy of it, Mr. Ritter?
A. I believe we may have a copy of it. I don't know whether we do, or not.

Mr. Gill: We would prefer to retain the original.

Dep. 12-12-57 page 189

Mr. Kellam: Check that, Mr. Hodges, and see if it is the same.
Mr. Hodges: The bond is not attached to the copy.
Mr. Kellam: There is already in evidence as Plaintiff's Exhibit 1 a copy of the same contract that he is referring to, the only difference being a copy of the bond is not attached, but that has been introduced this morning.
Mr. Fine: The only difference is it isn't signed by Harold Higgerson.
Mr. Gill: Can't you stipulate that the original was so signed?
Mr. Fine: Yes.
Mr. Kellam: That is agreeable.
Mr. Fine: Let the record show Plaintiff's Exhibit 1, dated May 30, 1957, does not show that it has been signed by Harold Higgerson and witnessed by H. L. Hodges, and it is stipulated that they were the parties to the agreement.
Mr. Kellam: It is stipulated that the original contract which is in the hands of Mr. Ritter was signed by Harold Higgerson and witnessed by Mr. Hodges.

Dep. 12-12-57 page 190

Mr. Fine: If that be the case I won't stipulate. It was accepted and agreed to the first day of July, 1955, and signed Harold Higgerson and witnessed by Mr. Hodges.
Mr. Kellam: That is what I said.

R. E. Ritter.

Mr. Fine: Signed by Harold Higgerson, the original.

Mr. Kellam: That is what we agreed to. I said May 30 was the date. It shows June 27, 1955.

Mr. Fine: The exhibit is dated May, 1955, initialed G. F. M., and the letter is dated June 27, 1955.

I don't know how I can be any more explicit than that.

Mr. Kellam: All right.

By Mr. Fine:

Q. Now, the date of the completion of this work was to be what date?

A. It is in the contract.

Q. Will you refer to it, please?

A. June 27, 1955, which was 120 calendar days.

Q. All right, sir. Was there anything in your contract with regard to any extra work?

A. There is a stipulation in the State Highway contract that any item they can increase twenty-five per cent or decrease it twenty-five per cent.

Dep. 12-12-57 page 191

Q. At what price?

A. At the same price that was bid.

Q. Did you know Enlow and Son had made a contract with Higgerson Brothers in connection with this work?

A. I understood they did.

Q. Did you accept Enlow and Son in the place instead of Higgerson Brothers?

A. We knew Higgerson Brothers were having them do work but we were still holding the Higgerson Brothers.

Q. Did you know what the contractual relations were between Enlow and Son and Higgerson Brothers?

A. No.

Q. Do you know whether or not the contract provided for Enlow and Son to do extra work?

A. I know this, that when this increase came up Mr. Enlow was there with the engineers, and my son was there, and he said he would be glad to have the additional work.

Q. He said he would be glad to have the extra work?

A. Yes.

Q. Did he tell you that?

A. Yes, and I believe I was there when he said it.

Q. That he would be glad to have the extra work?

A. Yes.

R. E. Ritter.

Q. You were present?
Dep. A. Yes.
12-12-57 Q. Do you know what bid Higgerson Brothers
page 192 } made on that with you?
A. It is right here.
Q. I am talking about the extra work.
A. They didn't bid on any extra work.
Q. You are sure of that?
A. Yes. After Mr. Enlow got the job Higgerson Brothers said they would take it on but their price was too high, therefore, we got the Vanguard Construction Company to do it.
Q. You did get a price from Higgerson Brothers for the extra work?
A. Yes.
Q. And you turned that down?
A. That is right.
Q. You then got the Vanguard?
A. That is right.
Q. After Enlow and Son got off the job, quit the job, did you get Higgerson Brothers to do any of the work?
A. Higgerson Brothers got Carter and Correll to come in to do some of the work Enlow was supposed to do.
Q. Did you pay Carter and Correll?
A. No, Higgerson.
Q. You didn't make a contract with them.
A. No.
Dep. Q. Why didn't you get Higgerson Brothers to
12-12-57 finish doing the extra work?
page 193 } A. Because they would not do it.
Q. What reason did they give you for not doing it?
A. They said they couldn't do it at that price.
Q. Did Higgerson Brothers give you a written estimate of the extra work?
A. No. That was done over the telephone.
Q. They gave you a price on the telephone?
A. Yes.
Q. And you deemed it to be—
A. All out of reason.
Q. Did you tell them they were supposed to do it under the contract?
A. Yes.
Q. And you would look to them for damages?

R. E. Ritter.

A. That is right.

Q. Do you remember when that conversation was?

A. No, I don't. I think my son is the one who talked to Mr. Higgerson.

Q. Have you got the dates when Carter and Correll finished the job, or progress notes on it?

A. No, I haven't got those dates. I think maybe Carter and Correll have them.

Q. I have got them. Do you know when they finished the job?

Dep. 12-12-57 page 194 } A. No, I don't; sometime in the Spring, probably April or May.

Q. You don't remember the exact date?

A. No.

Q. Who else did you try to get the work done by besides Vanguard?

A. I think Pinkston.

Q. Did you get bids from them?

A. No. I talked to them.

Q. Who else did you contact?

A. I think they are the only ones.

Q. As I understand it, Vanguard had no other competition on the bid.

A. No. We were glad to get them to accept it. We had to get the work done as the Highway Department was behind us on it.

Q. When did you tell these people, Higgerson Brothers, that you could not have them do the work because of their price?

A. I don't know that date. I don't remember the date we talked to them.

Q. I hand you Plaintiff's Exhibit 8, dated May 30, 1957, letter addressed to Enlow and Son—dated March 24, and with a copy to the T. E. Ritter Corporation, and will get you to look at that.

Dep. 12-12-57 page 195 } A. I imagine that is when Harold asked Higgerson to go ahead with it.

Q. That is the approximate date, isn't it?

A. I imagine it is.

Q. You got a copy of that letter dated March 24, 1956, addressed from Higgerson Brothers to Enlow, a copy to your corporation?

A. We may have. I don't recall.

Q. Can you examine your files and give us that? Do you have your files here?

A. No, I haven't.

R. E. Ritter.

Q. Can you call your office and check to see whether you have a copy of that in your file?
A. Yes.

The Commissioner: Let's take a five minute break, gentlemen.

* * * * *

Dep.
12-12-57
page 196 }

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By Mr. Fine:
Q. I believe you are waiting to get a call from your office?
A. They tried to find it from the field office They don't have it in the office.
Q. Do you know whether any reply was made by Enlow and Son to that letter dated March 24, 1956, if you received that copy?
Dep. A. No.
12-12-57 Q. You were in Florida at the time?
page 197 } A. Yes. I didn't get back from Florida until April 15th.
Q. You don't know whether or not Enlow and Son had any agreement with the Higgerson Brothers to do any extra work?
A. No.
Q. You always looked to Higgerson Brothers for performance of the work in connection with the contract and the performance bond?
A. Yes.
Q. Now, you have just said you heard Mr. Enlow say he would be glad to do the extra work?
A. Yes.
Q. He didn't say at what price, did he?
A. It was understood at the same price.
Q. If he had a contract with him to do it at the price—
A. Yes.
Q. —you are not familiar with the contract yourself?
A. No, I don't know anything about his contract with Higgerson, but I do know the State Highway Department has it

in their contract that they can increase or decrease it at any time to twenty-five per cent.

Dep. 12-12-57 page 198 } Q. You do know that Enlow and Son were interested in this extra work, but you can't say whether you got that letter, or not?

A. No.

Q. All right, sir. Now, in connection with the delay on this job, Enlow and Son didn't do the work in 120 calendar days; is that correct?

A. I guess they didn't.

Q. You don't know of your own knowledge why it was not done within 120 days so far as Higgerson Brothers and Enlow are concerned?

A. No. I could say some things, but it may be better not to.

Q. You don't know except hearsay?

A. No. I was not on the job when I was in Florida.

Q. When did you go to Florida?

A. In January.

Q. Do you know whether or not the work had stopped before you went to Florida?

A. No, it had not stopped.

Q. They were working on the job at that time?

A. Yes.

Q. Isn't it a fact that you are now having some differences with the State Highway Commission in connection with the delay on the job?

Dep. 12-12-57 page 199 } A. We are not now because we accepted the final estimate and they charged us $15.00 a day penalty for the time we were overtime.

Q. Who did you charge that to?

A. Prorated it over the subcontractors.

Q. How much did you charge Higgerson Brothers for the delay?

A. I think we have it here. It was a small part of it. We charged him for fourteen days.

Q. Those fourteen days you charged them, did they accept it?

A. They accepted our final estimate we mailed to them, and I understand that—

Mr. Fine: There is a call for Mr. Ritter concerning that information.

(The last question and answer were read as follows):

R. E. Ritter.

"Q. Those fourteen days you charged them, did they accept it?

"A. They accepted our final estimate we mailed to them, and I understand that—"

By Mr. Fine:

Q. Now, isn't it a fact they questioned it on account of weather conditions?

Mr. Kellam: I object to that. He is leading the witness.

Dep.
12-12-57
page 200 } By Mr. Fine:

Q. What objection did they have to it?

A. Maybe they felt as if they should not have been penalized for the delay.

Q. What reason did they assign for it?

A. That I don't know.

Q. Have you got the figures on how much the extra work cost you? I don't mean the original contract, but the extra work itself.

A. How much it cost?

Q. Yes, the total sum for the extra work that was not included in the original contract.

A. No, I haven't got it.

Q. I will have to ask you to let us have it.

A. All right. I think it could be figured out.

Mr. Gill: May I interpose and make a suggestion? Can Mr. Ritter get the figures and send a copy to Mr. Fine and to Mr. Kellam so that you can stipulate it?

Mr. Kellam: I am willing to stipulate it.

Mr. Gill: All right.

A. (Continuing) Right here is a bill sent to Higgerson Brothers which is 828 feet at $2.00, the difference of what we had to pay more than our contract with him.

Dep.
12-12-57
page 201 } By Mr. Fine:

Q. That is a total of how much?

A. $1,656.00, and then there was also repairs to the street.

R. E. Ritter.

Q. Let me ask you this: what I am asking you specifically is what the extra work cost over and above the contract price that you say Higgerson Brothers had to do?

A. That is over and above the cost?

Q. How much is that?

A. $1,656.00.

Q. Let me ask you this question: On the original contract itself, without the extra work, did Higgerson Brothers do that work? I am not speaking of the delay, but they did complete the job, did they?

A. Finally they had Carter and Correll to complete it.

Q. But it was done through them?

A. Yes. There is another item here of $990.00.

Q. What is that for?

A. Resurfacing of Columbia Street, and the 828 additional feet was added.

Q. In other words, $1,660.00 and $990.00?

A. $1,656.00.

Dep. 12-12-57 page 202 } Q. And $990.00 for resurfacing extra work?

A. Yes.

Q. You don't know whether Enlow and Son had anything to do with the resurfacing, or not?

A. No.

Q. All that time you looked to Higgerson Brothers, and your contention is that they were supposed to do it all at the same figure?

A. Yes.

Q. And the total of those figures was—

A. $2,646.00.

Q. $2,646.00?

A. Yes.

Q. Referring to the delay, you received an offer or proposal from the Vanguard Construction Corporation, as shown in Defendant's Exhibit 4, dated December 12, 1957, as contained in this letter; is that correct?

A. Yes.

Q. They didn't commence the work until the latter part of July; that is correct, isn't it?

A. That is correct, I think.

Q. You had a delay there of approximately 30 days from the date of proposal until the date of their commencement on doing this extra work. Isn't it a fact that some of the paving had to be done there, and this work had to be done previous

to the pavement being put down? When could the manholes be put in?

Dep. 12-12-57 page 203

A. Right along with the drainage.

Q. Did they have to wait for anybody to resurface?

A. No.

Q. If you had had the Vanguard Construction Company commence the job earlier than July the work would have been done earlier, would it not?

A. Yes, they could have done our work earlier but we would not have finished any sooner. We were held up on account of not getting the original contract down here and we were delayed fourteen days so far as we were concerned.

Q. In your opinion, the prime contract was abandoned because the job had not been completed originally on account of the extra work?

A. Yes.

Q. All right.

A. I will lead you a little further—

Mr. Fine: That is all right.

Mr. Kellam: Let him answer the question. I submit the witness is entitled to complete his answer. He can answer and then make any explanation he wishes.

By Mr. Fine:

Q. Have you finished your answer?

Dep. 12-12-57 page 204

A. The reason they didn't take this extra work, the rest of the work, they took off and went off on the street sewer, and they didn't tie in with the concrete at all which went out Columbia Street.

Q. After Enlow and Son got off the job because they had to make the payroll, and that is our testimony which is uncontradicted, how long was it before Enlow and Son—Higgerson Brothers got Carter and Correll to start the work?

A. I can't say how long it was.

Q. Approximately?

A. I can't say that because I wasn't here, but I know my son had called up Mr. Higgerson and Mr. Higgerson made arrangements for Carter and Correll to go ahead.

Q. You don't know the time because you were out of town?

A. No, I don't.

Mr. Fine: Your witness, sir.

R. E. Ritter.

CROSS EXAMINATION.

By Mr. Kellam:

Q. I have about three questions, Mr. Ritter. Mr. Ritter, I hand you Defendant's Exhibit 5 which appears to be a summation or memorandum of payments made by T. E. Ritter Corporation to Higgerson Brothers and sums withheld, and ask you if the item of $630.00 is liquidated damages for the fourteen days delay that was deducted?

Dep. 12-12-57 page 205

A. Yes.

Q. You have referred to an item of $2,646.00 which represents repair of Columbia Street after laying the pipes, $990.00, and $2.00 per foot for pipe laid by Vanguard Construction Company?

A. Yes.

Q. There is an additional item of $104.00 which was the difference in contract price on the catch basins?

A. Yes.

Q. I hand you Plaintiff's Exhibit 12 which is copy of the letter of March 26th, 1956, from Higgerson to T. E. Ritter Corporation, and he asked you if you would check and see if you have this original or your field notes and you said you hadn't been able to locate it?

A. That is right.

Q. You don't know whether it was received, or not?

A. No.

Q. You know Carter and Correll?

A. Yes.

Q. Are they capable and efficient contractors?

A. Yes. They have done considerable work for us and we got along *ver* well with them.

Q. Do you know whether the prices charged by them were in line with other contractors doing similar work?

Dep. 12-12-57 page 206

A. Yes.

Q. Are you familiar with the Portsmouth Paving Company?

A. I know Jimmy Crocker very well.

Q. Are they, in your opinion, capable and efficient contractors?

A. Yes.

Q. Are the charges they made in line with the other contractors for similar work?

A. Yes.

R. E. Ritter.

Q. A few minutes ago you started to answer some question about how the work was performed by Enlow and Son on the job. Was it performed properly and in an efficient manner?

Mr. Fine: I object to that as improper, irrelevant and immaterial and not a proper question whatsoever. Let the record show we object.

Mr. Kellam: You may answer it, if you will.

A. Well, it was not handled as it should have been, and Mr. Enlow had his son over there, and I think it was the first job they had, and they were trying to get started in business, and it is unfortunate that they didn't take it and go ahead as they should have.

Dep.
12-12-57
page 207 } RE-DIRECT EXAMINATION.

By Mr. Fine:

Q. Did you know Higgerson Brothers knew this was the first job Enlow had started on?

A. I don't know whether he knew it. The fact is I had—we knew it because Enlow wanted to do the work for us and at that time he was not set up to take over $20,000.00 worth of work, therefor, we couldn't make any deal with Enlow.

Q. You wouldn't be surprised to know that Mr. Enlow had told Mr. Higgerson this was his first job?

Mr. Kellam: This is his witness and he is leading. I object to the question.

Mr. Fine: I have a right to cross examine him on the subjects which you brought out on cross examination.

Mr. Kellam: I didn't ask him whether it was his first job.

Mr. Fine: You asked him if they did this work in an efficient manner. I am asking him whether he had discussed it with Higgerson Brothers.

Dep. By Mr. Fine:
12-12-57 Q. You don't know what Higgerson and Enlow
page 208 } had talked about?
A. No.

Q. Did I misunderstand you when you said you had pro-

rated the delay of fourteen days and figured it at $15.00 a day?

A. Maybe I stated $15.00, but it was $45.00.

Q. You testified on direct examination it was $15 00 and your memorandum shows fourteen days at $45.00.

A. Yes.

Q. That is an error?

A. Yes. I can show you the records from the State—as to how much was deducted.

Q. Have you got your memorandum here in connection with the penalty imposed by the State?

A. No.

Q. Will you make a copy of that and send it to us?

A. Yes.

Mr. Kellam: Let him send a copy of it to the Commissioner.

By Mr. Fine:

Q. And also how you prorated the fourteen days.

A. All right.

Dep. 12-12-57 page 209

Mr. Kellam: Is it understood that it is stipulated between counsel that the memorandum which Mr. Ritter is going to send in there may be introduced as evidence?

Mr. Fine: I ask him to produce them. I asked him in the subpoena *duces tecum.* He doesn't have them today.

Mr. Gill: Let me see the subpoena *duces tecum.* Does it specify that?

Mr. Fine: Yes.

The Commissioner: I don't think we have to have any stipulation on that.

Mr. Gill: May I ask if counsel for the proponents agree on that?

Mr. Kellam: I am willing to have it introduced without the necessity of Mr. Ritter coming back.

Mr. Fine: It is all right if I want to introduce it.

Mr Kellam: Does counsel object to the Commissioner putting it in?

Mr. Fine: I want to see whether or not it is relevant and material to my case.

Testimony has been adduced that it was $15.00 a day and

now he says it was $45.00. I want to check it.

Dep. 12-12-57 page 210

If you wish to introduce it, that will be your privilege.

The Witness: The reason I said $15.00 a day is that originally it was to be $15.00 and it went up to $45.00.

Mr. Fine: There was that discrepancy in the testimony and I want it to bring it out.

The Commissioner: At this point there has been no stipulation that the document be filed in evidence.

Mr. Kellam: It is my understanding Mr. Ritter said he would send a copy to the commissioner and copies to us.

Mr. Gill: Is it stipulated that copies will be sent to the Commissioner and counsel? Is that agreeable?

Mr. Fine: Yes.

The Commissioner: Is the copy that comes to me to be put in evidence?

Mr. Fine: If the Commissioner wishes.

The Commissioner: There is one document that has been required by the subpoena duces tecum, and I will probably receive two documents. Do you want them offered in evidence?

Dep. 12-12-57 page 211

Mr. Kellam: It is my understanding they will be offered.

The Commissioner: Do you want to introduce them?

Mr. Fine: I don't know whether I want to put them in, or not.

And further this deponent saith not.

MARVIN STUART CARTER,

called as a witness on behalf of Enlow and Son, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:

Q. State your full name, please, sir.

A. Marvin Stuart Carter.

Q. Your age, residence and occupation.

A. Fifty-two, 1721 Arlington Avenue in Norfolk.

Q What business are you in?

A. Construction business.

Q. Did you, or not, complete the job of Higgerson Brothers

on the City of Portsmouth Project number—
Dep. Gosport Road and High Street?
12-12-57 A. We did some work for Mr. Higgerson on
page 212 } the catch basins only.
Q. Have you a memorandum of the work you did?
A. I have it at the office but don't have it with me.
Q. Of course, you have a subpoena *duces tecum* for it. When did you start on that job?
A. Our part of the work?
Q. Yes.
A. We started about July—let's see—1956.
Q. July, 1956?
A. Yes, somewhere right around there.
Q. When you took the job?
A. Yes. Our portion of the contract was with Mr. Ritter. We had a section of pipe installed with a smaller pipe from the twenty-four inch.

By the Commissioner:
Q. You say that was with whom?
A. With Mr. Ritter.

By Mr. Fine:
A. I take it you had no contract at all with Enlow and Son?
A. No.
Dep. Q. And I take it you had no contract with Hig-
12-12-57 gerson Brothers?
page 213 } A. What we did with Mr. Higgerson was verbal. I don't believe we had a contract. It was a formal letter.
Q. It was a formal letter?
A. I believe so.
Q. You don't have a copy of it?
A. I don't have it with me.
Q. I hate to have to bring you back.

Mr. Kellam: I call your attention to Defendant's Exhibit 4 which is a letter from Carter and Correll to Higgerson Brothers, attention of Mr. Harold Higgerson, to which there was attached other memoranda and statements from Carter and Correll.

I believe they should be handed to the witness to refresh his memory some and explain what the contract is.

Marvin Stuart Carter.

Mr. Fine: Has this been introduced in evidence?

Mr. Kellam: They were attached as exhibits and they are all in there. All of it is a part of Exhibit 4.

Mr. Fine: You know that of your own knowledge?

Dep. 12-12-57 page 214

Mr. Kellam: I know they were all exhibits. If you wish I will be willing to check them. The first letter is dated July 16, 1956.

My recollection is they were all put in at one time and they must have been introduced, otherwise the Commissioner would not have them.

Mr. Fine: All right.

By Mr. Fine:

Q. Mr. Carter, this is your signature on that letter of July 16th, which is Defendant's Exhibit 4?

A. Yes.

Q. You didn't do any cleaning out, did you?

A. Yes, we cleaned out a few basins.

Q. How much are you charging for that?

A. I wouldn't know unless I examined my records. I have all of my records in the office. It should be on these letters there of Mr. Higgerson.

Q. They have abandoned that anyhow. As I understand it, you have no records here today whatsoever?

A. No, I didn't bring any. I didn't understand it that way.

Q. There is an order there with reference to that. I am sorry you didn't understand it. This was typed in your office, was it?

A. Yes, by me.

Dep. 12-12-57 page 215

Q. Referring to Defendant's Exhibit 4, this constituted your agreement with them, did it?

A. Yes.

Q. When did you commence work on that job? Do you have any progress notes on it?

A. When we started our part of the contract?

Q. Yes, with Higgerson Brothers, not Ritter.

A. With Higgerson?

Q. Yes.

A. It would be, I would say, the month of the first invoice we sent them.

Q. I will let you look at the papers to refresh your memory.

A. Apparently we did work for Mr. Higgerson beginning in July.

Marvin Stuart Carter.

Q. What date in July did you commence work?

A. I can't answer that without going through my records. Yes, here it is. Here is the exact dates we did the work.

Q. You started when?

A. Sometime in July.

Q. You dated this bill July 30, 1956?

A. Yes.

Q. Do you have any notes in your file as to when you actually started work represented by this bill?

Dep. 12-12-57 page 215a }

A. These are the only notes I have in my file. I have a copy of them.

Q. Do you have any field notes?

A. No, I didn't keep it daily.

Q. Would your time books show?

A. No. I don't think there was any notes made as to what the men were actually doing.

Q. Do you know how long the job had been abandoned before you started on it, how long had it been since Enlow and Son had quit on this job?

A. Mr. Enlow laid all the pipe, and I can't say definitely when he—

Q. Do you remember the month?

A. I can't remember when he left over there. I have no records here that would help me on that. I know after he had left we finished the basins.

Q. Were you working on the job independantly of him?

A. Oh, yes.

Q. Could Enlow and Son have done the catch basins without completing the pipe work?

A. Could they have?

Q. Yes.

A. No. They would have had to have completed the pipe to complete the basins. That would have been the normal operation.

Dep. 12-12-57 page 216 }

Q. That is normal operation?

A. Yes.

Q. In your letter of July 16th you referred to having had a conversation with them that morning.

A. Yes.

Q. You were on the job out there before?

A. Yes.

Q. Had you been approached by Higgerson Brothers to do that before that morning?

Marvin Stuart Carter.

A. Yes, I think we had been asked if we would finish the basins for him.

Q. When was the first time he asked you to do that?

A. It could not have been more than probably thirty days prior to the actual agreement.

Q. Why didn't they get you to do it then when they asked you?

A. We didn't know whether we were going to do it, or not.

Q. Did you tell them that?

A. Yes.

Q. That would be about as much as a month before that.

A. Yes.

Q. It could have been, say, June 16th? This letter is dated July 16th.

A. It could have been along in that time.

Dep. 12-12-57 page 217 } Q. Do you know whether they had asked anybody else to complete the work between June and July?

A. No, sir.

Q. Was there any question about the price; did they want to pay you the price you were asking, or was there any question about it?

A. I am sure there was some kind of conversation about the price, and we agreed to do it at the regular price we had bid the rest of the work at.

Q. When did you first tell them after June 16th you would do the work; was that on July 16th?

A. That was the date of the letter.

Q. That is the first time?

A. Yes. That is a confirmation of the agreement.

Q. With regard to the amount of money that you were paid for the completion of this work did you get checks from Higgerson Brothers or Ritter?

A. We got checks from Higgerson Brothers.

Q. Do you know when your first payment was made?

A. Immediately after this first bill was sent to them.

Q. In a week or ten days?

A. Yes.

Q. Within a week or ten days?

A. Yes, that is right.

Dep. 12-12-57 page 218 } Q. After you got on the job to complete this work there was no delay on your part?

A. No. We carried on our portion of the job in our spare time as we agreed to do with Mr. Higgerson.

Marvin Stuart Carter.

Q. You mean your spare time?
A. I mean when we didn't have anything else that was urgent.
Q. You did your original job that you had with Ritter?
A. Yes.
Q. Primarily?
A. Yes.
Q. Then you pieced that in between times as you had an opportunity to do it?
A. Yes.
Q. Because your primary obligation was to Ritter?
A. Yes.
Q. Did you tell Higgerson Brothers that is the way you were going to do it?
A. Yes.
Q. Did Mr. Higgerson know you were going to do it that way?
A. Yes.
Q. Did you later confirm that conversation?
A. I don't know.

Dep. 12-12-57 page 219

Q. Your letter says, "In accordance with our conversation."
A. Yes.
Q. With your primary work, how long would it take you to do the work?
A. For Mr. Higgerson?
Q. Yes.
A. It would have taken the biggest part of a month.
Q. Would you say about twenty days?
A. About twenty to thirty days.
Q. While you were on the job piecing it, it took you the balance of July, and you worked on it also in August; is that correct?
A. That is right.
Q. You worked on it in September?
A. Yes.
Q. When did you complete the job?
A. In November.
Q. What date in November?
A. I can't say definitely. I would say around the 15th.
Q. That was understood by them, that you were to do it that way?
A. Yes.

Marvin Stuart Carter.

Mr. Fine: I would like to ask the Commissioner to mark these others that are not marked on there.

Dep. 12-12-57 page 220

The Commissioner: I think to staple them together would be the proper thing to do. Mr. Kellam, will you inspect this exhibit and see if it is in order?

Mr. Kellam: Yes, sir.

By Mr. Fine:

Q. Did I understand you to say that it was in November the last day you worked on it?

A. Yes.

Q. What date in November?

A. I don't remember exactly, probably around the 15th.

Q. In addition to your doing this sort of work, Pinkston of the City of Norfolk does this same kind of work?

A. Yes.

Q. When you were bidding on this job and agreed with him on the price as indicated in your letter, was this a competitive bid that you had?

A. I felt that it was an extension of our work over there. We were doing work for Mr. Higgerson at the same time we were doing work for Mr. Ritter, the prime contractor.

Q. Your price was a little different price with Higgerson than it was with your prime job?

A. It was the same price.

Dep. 12-12-57 page 221

Q. The same price?

A. Yes.

Q. The work you did for Higgerson was incidental to your prime contract?

A. Yes.

Mr. Fine: All right, sir, your witness.

CROSS EXAMINATION.

By Mr. Kellam:

Q. I hand you a statement on your bill here to Higgerson Brothers which shows the total amount of work that you performed was $4,043.00. Does that represent the work you did for them?

A. Yes.

Q. The work which you did was work which is described in these various letters and statements which are a part of exhibit 4?

Marvin Stuart Carter.

A. Yes.

Q. I hand you Plaintiff's Exhibit 14 which is a letter to you authorizing you to do certain work?

A. Yes.

Q. That was in connection with this work that you did?

A. Yes. It is right here, saying, "We hereby authorize you to complete one drop inlet and one manhole."

Dep. 12-12-57 page 222

Q. Was the price that you charged for the work that you did a fair price for that type of work?

A. The original contract was at the same figure.

Q. Was it a fair price?

A. It was accepted by the Highway Department.

Q. Was it a competitive figure?

A. Yes.

Q. Was it in line with prices charged by other contractors for similar work?

A. Somebody else would have charged more.

Q. You think what you did it for was less than what he could have some other contractor do it for?

A. I think so.

Q. Do you know the Portsmouth Paving Company?

A. Yes.

Q. Will you state whether or not they are competent people to do paving of roads and streets, and do it in an efficient manner?

A. Oh, yes.

Mr. Fine: I want to object to that. There is no question about the capability of anybody. We believe they are efficient and capable.

It is a question of breaching a contract. We think they are the finest sort of people. Of course they are.

Dep. 12-12-57 page 223

Mr. Kellam: His counsel will stipulate they are capable to do the work at the prices charged, and the prices charged are in line with other contractors, that is all we want to show.

Mr. Fine: I am not willing to stipulate that. You are handling your case and I am handling mine.

By Mr. Kellam:

A. Again I will ask you whether or not the prices charged were in line with prices charged by other competitive contractors.

A. Will you state that again?

Marvin Stuart Carter.

Q. Whether or not the prices for work done by the Portsmouth Paving Company to complete this work were in line with competitive contractors?

A. As far as Carter and Correll were concerned, we had nothing to do with work for them.

Q. All I want to know is from your knowledge and opinion—

Mr. Fine: I object to that on the grounds he has not laid a foundation. This gentleman doesn't know what they bid.

By Mr. Kellam:

Q. State whether or not the prices they charged were in line with other contractors.

Dep. 12-12-57 page 224

A. I believe it was.

Q. You were already on the job doing some work?

A. Yes.

Q. If some other contractor had moved in and done the work that you did for Higgerson Brothers, in your opinion could they have done it as cheaply as you did?

A. I don't see how they could.

RE-DIRECT EXAMINATION.

By Mr. Fine:

Q. You say you could have done that work within thirty days?

A. Yes.

Q. Or less?

A. I think so.

RE-CROSS EXAMINATION.

By Mr. Kellam:

Q. You didn't do work continuously for the completion of Higgerson Brother's contract?

A. No.

Dep. 12-12-57 page 225

Q. Did that delay the completion of the job in any manner?

A. I don't think so.

Q. Did it add to the cost and expenses of doing the job?

A. I would say no.

Mr. Fine: We will ask for a few minutes recess.

M. S. Carter.

The Commissioner: All right. We will take about a ten minute break.

M. S. CARTER,
a witness herein, having been previously sworn and examined, was recalled for further examination and testified as follows:

By Mr. Fine:
Q. Could you have done the catch basins and the inlets on this job before the paving had been done by Ritter?
A. Could not have finished them.
Q. You could not?
A. No.
Q. When you commenced the job on July 16th you were waiting for that to be done, and that was done in piecemeal; is that correct?

Dep.
12-12-57
page 226 } Mr. Kellam: I object to leading the witness.

By Mr. Fine:
Q. Were you delayed by the paving down there at that time?
A. No, I don't think so.
Q. By reason of your doing it piecemeal incidental to your prime contract, were you delayed by doing that because you did it incidental, or were you delayed by the paving not having been done?
A. The work we did for Mr. Higgerson I would say we did in fifteen or twenty days, but that didn't have any bearing on the completion of the job. We were done out there before Mr. Ritter completed the job.
Q. I am not trying to contradict you, but to get it clear in the record. What I understand, you say the paving had not been done when you started the job. You were not delayed by Mr. Ritter?
A. I don't think there was an incident over there where we were actually held up because the paving was not being done. We had plenty of work to do all the time.
Q. I am sure of that but I am speaking of the work you did for Higgerson.
Dep. A. It was not held up.
12-12-57 Q. You say you could have done the work in
page 227 } about thirty days?
A. For Mr. Higgerson?

Q. Yes.
A. Yes.
Q. Without any question of delay?
A. Yes. We might have done it a bit quicker than that.

And further this deponent saith not.

HOWARD L. HUBBARD, JR.,
called as a witness on behalf of Enlow and Son, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:
Q. Mr. Hubbard, you are connected with the Portsmouth Paving Company, are you not?
A. Yes.
Dep. 12-12-57 page 228
Q. What is your official position?
A. I think my official position is assistant office manager but I do a little bit of everything.
Q. Do you have the records of the Portsmouth Paving Company in connection with work done on project on Gosport Road and High Street?
A. Yes.
Q. Let me see them, please, sir.
A. I think they are all here (handing papers to counsel).
Q. Let me get them in order. Are you in position to tell us what work was done in connection with the particular work of repaving, and certain catch basins and inlets which would be after July, 1956?
A. I have these showing materials we just loaded on the truck at the time.
Q. Have you got anything there for any paving you did?
A. Yes, here is a patch job we did. That was in April.
Q. I am talking about subsequent to July.
A. Here is July 16th we paved Columbia Street from Airline to Rodman, and that was the only paving we did unless it was back in April.
Q. Will you take that bill out?
Dep. 12-12-57 page 229
A. This is the invoice.
Q. All right. This is patching you did April 20, 1956 and that is charged to Higgerson?
A. Yes.
Q. That was paid July 9, 1956; is that right?
A. Yes.

Q. And charged to—

Mr. Fine: I would like to introduce that.
The Commissioner: Received and marked Defendant's Exhibit 9.

By Mr. Fine:
Q. In June, 1956, you made a contract with Higgerson Brothers as shown by this letter.
A. Yes, sir.
Q. Is that right?
A. Yes.
Q. For that you were paid $1,949.50?
A. He paid $1,500.00 on the 15th of August.
Q. Yes.
A. And the balance he paid on January 15th.
Q. And who did you get the checks from?
A. Higgerson.
Q. Higgerson Brothers?
A. Yes.

Mr. Fine: I would like to introduce that.
The Commissioner: Received and marked Defendant's Exhibit 10.

Dep.
12-12-57
page 230 } By Mr. Fine:
Q. Do you know when you completed that work?
A. July 18, 1956.

Mr. Fine: All right, sir, your witness.

CROSS EXAMINATION.

By Mr. Kellam:
Q. Mr. Hubbard, the work which you did and the price charged, were they in line with prices charged by competitive contractors for similar work?
A. Yes.

Mr. Kellam: That is all.

Herman A. Enlow.

RE-DIRECT EXAMINATION.

By Mr. Fine:

Q. You don't do the figuring on the jobs?

A. No. Mr. Crocker and Mr. Saunders estimate and I do all the typing and help Mr. Saunders check their jobs. I do some myself.

Q. You are not familiar with bidding on the jobs?

A. Only I help on the work there. The bidding is done by them.

Q. You don't figure the bids?

A. No.

Dep.
12-12-57
page 231 } Mr. Fine: As far as I am concerned, you may be excused.

Mr. Kellam: Let me glance at that just a second.

Mr. Fine: Thank you very much. You may go as far as I am concerned.

And further this deponent saith not.

HERMAN A. ENLOW,
a witness herein, having been previously sworn and examined, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:

Q. In looking over the record the last time, when money was deposited for the payroll as stated by Mr. Hodges on page 136, that was May 11, 1956.

After that time you had to leave the job, you testified?

A. Yes.

Dep.
12-12-57
page 232 } Q. The question I want to ask you is this: when you got off the job after the payroll was not made by Mr. Higgerson, was your work up to date, or not?

A. My work was completed, as far as I know, up to that time.

Q. Why did you not go any further?

J. M. Hagan.

A. We couldn't until the catch basins and the drop inlets and paving had been done.

Q. Had you completed the pipe work?

A. Yes.

Q. How much time was involved in that?

A. During the entire job?

Q. Yes. Were you up with your work at that time?

A. Yes. I don't know why it should have been delayed as long as it was.

Q. How long did they delay this?

A. The curbing was not started until the time I stated.

Q. After you got off the job in May, after the last deposit was made by Higgerson on the payroll, were you right up to scratch on your work, or not?

A. Yes, as far as we could possibly go.

Q. Why were you waiting except for the payroll?

A. I had completed as far as we could go and I didn't have anything to do.

Dep.
12-12-57
page 233 } Mr. Kellam: Mr. Commissioner, we move to strike the testimony of Mr. Enlow just offered on the grounds the records are the best evidence.

The Commissioner: The motion is noted.

Mr. Kellam: I have no questions.

Mr. Fine: If your Honor please, we want to offer the records as to the progress on this job at the time to show exactly what he did.

The Commissioner: All right, sir.

Mr. Fine: We don't have them at the moment. We will make them available to Mr. Kellam and if Mr. Kellam doesn't agree to stipulate we will present the checks in the record itself.

* * * * *

Dep.
1-6-58
page 238 }

* * * * *

J. M. HAGAN,

called as a witness on behalf of Enlow and Son, having been first duly sworn, was examined and testified as follows:

J. M. Hagan.

DIRECT EXAMINATION.

By Mr. Fine:

Dep. 1-6-58 page 239

Q. Please state your name, age, residence and occupation.

A. J. M. Hagan, District Engineer, Virginia Department of Highways, Suffolk District. My residence is Chuckatuck, Virginia.

Q. I believe that you came here today in connection with an order of the Circuit Court of Norfolk County to bring the progress notes from day to day on the construction of the job of T. E. Ritter at the intersection of Routes 17 and 337, City of Portsmouth, Gosport Road and High Street?

A. Yes. These are the chronological notes. These are the daily reports and they are the weekly reports.

Q. The daily and weekly reports?

A. Yes.

Q. These are the weekly reports?

A. Yes.

Mr. Fine: We would like to introduce them with the privilege of withdrawing them at a later time by agreement of counsel, if it should be necessary.

I introduce these as Exhibits A, B and C.

The Commissioner: I will mark these Defendant's Exhibits 1, 2 and 3, January 6, 1958.

Mr. Fine: That is all I want to ask you.

Mr. Kellam: That is all.

Dep. 1-6-57 page 240

The Witness: I would like to get a receipt or something for those books.

Mr. Fine: Here is the order here. I am willing to sign this and say they were received here and filed.

The Commissioner: I will mark them received and dated by the Commissioner. If you want them you will have to apply to the Circuit Court of Norfolk County and not to me.

I will show that there have been received two copies of the daily progress reports and one weekly report of the T. E. Ritter job. Will that be sufficient?

The Witness: Yes. You might put the project number on it.

The Commissioner: Project number 1864-70, January 6, 1958. Is that right?

The Witness: Yes, sir.

Mr. Kellam: On behalf of the plaintiff we object to the

introduction of the Exhibits 1, 2 and 3, of January 6, 1958, on the grounds first that they are immaterial and irrelevant to the issues here involved, and not proper evidence.

The Commissioner: All right.

Dep. 1-6-58 page 241 } Mr. Fine: Let the record show with respect to the objection that in this case the records were made by Mr. Edmondson and they have been introduced without contradiction to show that Enlow and Son did their work promptly and properly and efficiently and their work ceased not by reason of any delay but because Higgerson Brothers had failed to meet the payroll.

The records will show that Higgerson Brothers had breached this contract whereby we have been damaged in connection with this matter.

And further this deponent saith not.

R. L. EDMONDSON,

a witness herein, having been previously sworn and examined, was recalled for further examination and testified as follows:

DIRECT EXAMINATION.

Dep. 1-6-58 page 242 } By Mr. Fine:

Q. I refer you to Exhibits 1, 2 and 3 which were introduced today on behalf of the defendants dated January 6, 1958, and ask you if those are not chronological notes in connection with this job?

A. Yes.

Q. It was your duty on that job to do what?

A. Keep the notes, and keep the job inspected in accordance with the rules and regulations of the State Highway Department.

Q. To inspect the job in accordance with the rules and regulations of the State Highway Department?

A. Yes.

Q. Since you haven't seen the notes today, look at them. As I understand it, it was two months before T. E. Ritter began paving; is that correct?

Mr. Kellam: I object to the question as leading.

Mr. Fine: I agree with my friend.

Q. The reason I asked you that is this: You testified on page 23 of the record dated September 3, 1957:

R. L. Edmondson.

"Q. How much time elapsed before T. E. Ritter began the pavement?

"A. Approximately two months before they began."

Dep. 1-6-58 page 243

Now that the records are here, will you tell me how much time it was before they began?

A. Before they began the pavement?

Q. Yes.

A. From what time?

Mr. Kellam: The record speaks for itself.

Mr. Fine: You may examine him when I get through. I am going to conduct my case as I wish.

Mr. Kellam: We call for the record as the best evidence.

A. You said two months from the time Ritter started paving until Enlow completed?

By Mr. Fine:

Q. Yes. Let me see if I can help you.

Mr. Kellam: I object to his helping him. His answer speaks for itself.

By Mr. Fine:

Q. I asked you on page 23 how much time elapsed before T. E. Ritter began the pavement and you said two months.

A. Approximately, that is right.

Q. Let's see if you testified to this—

Mr. Kellam: I object to that.

The Commissioner: I don't think it is proper for you to read what he testified to. Ask the questions and let him give the information from the record.

Dep. 1-6-58 page 244

Mr. Fine: I agree with you, that you are entirely correct, and the only reason why I am doing this is because he said before he didn't have the record.

I will ask him to refer to the record and see of those dates are correct.

By Mr. Fine:

Q. You testified on page 31, and referred to the record—

Mr. Kellam: I object to his reading from the record. He

may ask the question and let him look in his record to find it.

Mr. Fine: We have the records here. He has testified to it, and my friend would not want him here under any circumstances, but we want to show we didn't delay it.

By Mr. Fine:

Q. I ask you to look at the testimony on page 31; and then look at the record.

Mr. Kellam: I object to his looking at the record of the testimony.

A. You want me to verify the dates?

By Mr. Fine:

Q. Yes.

Dep. 1-6-58 page 245 } Mr. Kellam: If the records are already in the record there is no necessity to put them in again. If he is relying on what the witness said there is no necessity to put them in again.

Mr. Fine: I am not trying to contradict the witness, but have him identify the notes. He has objected to his looking at the record. He has objected to everything except his claim against us.

By Mr. Fine:

Q. After you have looked at them I would like for you to put a circle around the item.

Mr. Kellam: I didn't interrupt you, and I wish you would show me the same courtesy. The witness has already testified at a previous hearing and he was testifying from his field notes and the record so shows that.

A. These are my field notes, and even thought they were accurate they were not official.

By Mr. Fine:

Q. Take a red pencil and mark the dates on there as compared with what you have testified to before.

A. I am not sure whether I should mark this book.

R. L. Edmondson.

Dep. 1-6-58 page 246

Q. Just put a check mark there and give me a clip and we will put it on the page. Is that the page?
A. Yes.
Q. You are referring to page 55 in the diary?
A. Yes.
Q. On page 55 of Defendant's Exhibit 1, January 6, 1958?
A. Yes.

The Commissioner: Instead of marking the book, would it be better to go out there and tear off some adding machine tape and put on there?
Mr. Fine: All I want to do is put a check mark there showing the dates.

By Mr. Fine:
Q. Refer to other pages besides page 55. What other page is there?
A. Page 74.
Q. Page 74 of the same exhibit?
A. Yes.

Mr. Fine: If your Honor please, I would like to show you *a* this, sir, which shows March 29, 1956, and page 74 for June 22, 1956.
The Commissioner: Let counsel see them.

By Mr. Fine:

Dep. 1-6-58 page 247

Q. Now, Mr. Edmondson, having checked Exhibit 1 and after reading the pages into the record, state whether or not the records which have been introduced in evidence confirm and approve your testimony heretofore given on September 3, 1957.

Mr. Kellam: Objected to as being a matter for the Commissioner to decide.

By Mr. Fine:
Q. Do your records conform to your testimony heretofore given?
A. Yes.
Q. One other thing, sir. Now that you have the official field notes and the exhibits introduced here, Defendant's Exhibits 1 and 2, would you state whether or not from your memory and your record Enlow and Son performed the job in accord-

ance with the specifications, and did it have any delay on their part.

Mr. Kellam: Objected to as a matter of opinion.
Mr. Fine: Answer the question, please, Mr. Hagan.

A. Enlow and Son performed their work according to the Highway Department specifications.
Q. Were they behind in their work, or not?
A. They were not behind in their work.
Q. Refer to your notes about this matter in connection with the objection made by my adversary and state whether or not the work was promptly and efficiently done.

Dep. 1-6-58 page 248 } A. Very much.
Q. Did you make any report to the State Highway Commission stating that Enlow and Son had not done their work properly and promptly?
A. No, because the Highway Department doesn't recognize Enlow and Son so, therefore, our recognition would be the T. E. Ritter Corporation.
Q. So far as Enlow and Son doing the work was concerned it was done in accordance with the specifications and promptly?
A. That is correct.

Mr. Kellam: Objected to as leading.

By Mr. Fine:
Q. Did you ever make any complaint in connection with the work that Enlow and Son had done on this job while they were on the job?
A. To whom?
Q. T. E. Ritter or anybody else?
A. To the best of my memory, we didn't.

Mr. Fine: You may inquire, Mr. Kellam.

CROSS EXAMINATION.

Dep. 1-6-58 page 249 } By Mr. Kellam:
Q. Look at the two diaries which have been introduced and which are Defendant's 1 and 2, January 6, 1958 and show me anywhere in there

where you made any reference as to whether the work was done promptly and *satifactorily.*

A. The only reference I made was to dates.

Q. Show me anywhere in these diaries where you have made any reference to the work being satisfactory or not satisfactory.

A. I am sure you won't find anywhere in these diaries where the work was unsatisfactory because from my memory we didn't make any such entry.

Q. Is there any entry it is satisfactory?

A. No, I don't think so.

Q. Actually the diaries are both silent on whether the work was done satisfactorily or not?

A. There is no entry in there either way.

Q. In your dealings in connection with this project you and the Highway Department recognized only the prime contractor, T. E. Ritter Corporation; is that correct?

A. Yes.

Q. You didn't recognize any subcontractor?

A. No.

Q. Your entries deal with the prime contractor, T. E. Ritter?

Dep. 1-6-57 page 250 } A. Yes.
Q. And not with anybody else?
A. No.

Mr. Kellam: That is all.

RE-DIRECT EXAMINATION.

By Mr. Fine:

Q. If the work that Enlow and Son had done was not satisfactory would your records indicate that?

Mr. Kellam: I object to that one the grounds he has already testified they dealt only with the prime contractor and that they didn't deal with Enlow and Son.

A. My records would indicate probably—rephrase the question.

By Mr. Fine:

Q. If Enlow and Son had not done the work properly or had delayed it, would, or not, you have noted it and reported it?

R. L. Edmondson.

A. I would have made an entry in the diary and would have probably identified them by name in the diary for identification purposes only.

Q. As a matter of fact, you are paid a salary by the State of Virginia to inspect the work.

A. Yes.

Dep. 1-6-58 page 251

Q. When I say inspect it, what does your duty take care of in connection with the work that is going on?

A. Just about everything, taking care of the field notes, the character of the work that is being done, inspecting it and everything in connection with it.

Q. While Mr. Kellam asked you whether or not you only recognized T. E. Ritter as a prime contractor, if some one who is not the prime contractor does not do their work properly would you have noted it in your notes?

A. That is correct.

Mr. Fine: Thank you, sir.

RE-CROSS EXAMINATION.

By Mr. Kellam:

Q. You are inspector for the State Highway Department and you are concerned with the completion of the contract as a whole, are you not?

A. That is right.

Q. So far as the prime contractor is concerned, anything in connection with the contract that is all you were concerned with; is that not correct?

A. That would be correct.

By the Commissioner:

Q. You say that would be correct?

A. Yes. May I say—

Dep. 1-6-58 page 252

The Commissioner: You have answered the question.

Mr. Fine: He has a right to explain it.

A. I want to get clear that we look upon everybody out there as doing work as being one contractor, T. E. Ritter, and that there are no other companies on that job. We still look to them as the prime contractor.

R. L. Edmondson.

By Mr. Kellam:

Q. If Mr. Ritter or his firm did perform the whole contract within the time scheduled you would refer to that as being satisfactory; is that not correct?

A. Probably it could be satisfactory as far as the time element is concerned, and the work might not be satisfactory.

Q. If Mr. Ritter had a period of twelve months within which to complete the project and certain phases of the project were broken down to be completed during that period and the work was done satisfactory in accordance with the schedule, you would report that as being satisfactory, would you not?

Mr. Fine: I want to object to the question because it is based on specifications and not facts.

Dep. 1-6-58 page 253 } The facts are he testified if the subcontractor had done anything improperly he may not note it in his record, and he also stated three times that in accordance with the agreement if it was not done properly he would have noted it both as to time and quality of work. I object to it because it is not proper cross examination, and don't answer it.

By Mr. Kellam:

Q. Do you know anything about the subcontract Mr. Ritter let to Higgerson Brothers?

A. No.

Q. Do you know anything about what time schedule was placed in the contract, if any?

A. No.

Q. Do you know anything about the contract sublet by Higgerson Brothers to Enlow and Son?

A. No.

Q. Do you know anything about the time schedule in that contract, if there was one?

A. No.

Q. You don't know whether Enlow and Son were performing their work according to the schedule, do you, if there was a schedule?

Dep. 1-6-58 page 254 } A. I wouldn't say I didn't know. I don't know whether they were performing the work according to Ritter's or Higgerson's schedule, but according to my schedule made they were.

Q. You only know whether it was performed according to the prime contract?

Arthur E. Enlow.

Mr. Fine: I want to object to the questions on the grounds it is improper because he is trying to confuse whether the work Enlow did was based, the time schedule, on the contract Ritter had with the Commission.

My friend is confusing and muddying up the waters by trying to show that the time schedule in Enlow's contract was the same as that in the prime contract.

There is only one contract so far as this witness is concerned and it is based on schedule and quality of the work between the State Highway Department and T. E. Ritter.

Mr. Kellam: You may answer the question.

By Mr. Kellam:

Q. Do you know whether or not the work performed by Enlow and Son was performed in accordance with its contract with Higgerson Brothers?

A. No, I don't.

Q. Now, in your field notes have you at any place mentioned any person other than T. E. Ritter Corporation?

A. Very possibly. May I refer to them?

Q. Sure.

A. I believe I have but I won't be sure.

Dep.
1-6-58
page 255 } Mr. Kellam: We might put on another witness while Mr. Edmondson is going through this as it would save a little time.

Mr. Fine: All right.

ARTHUR E. ENLOW,

called as a witness on behalf of Arthur E. Enlow and Son having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:

Q. State your full name, please.

A. Arthur E. Enlow.

Q. Your residence?

A. 5113 Krick Street, Norfolk.

Q. Your occupation?

A. Construction Foreman.

Arthur E. Enlow.

Q. Are you connected with Enlow and Son?
Dep. A. I was.
1-6-57 Q. You are not with them now?
page 256 } A. No. I was with them maybe about a month after they started building, and we started working with the Drainage Engineers.

Q. Were you on the job with Enlow and Son, Incorporated, in connection with the Ritter job?
A. Yes, sir.
Q. On Route 17 and Gosport Road?
A. Yes.
Q. And High Street and Gosport Road?
A. Yes.
Q. Were you on the job continuously?
A. I was from the time I was employed, yes.
Q. State whether or not you worked on that job in July?

Mr. Kellam: The question is leading and suggesting an answer.

By Mr. Fine:
Q. How did you do your work on the job?
A. I don't quite understand you.
Q. Did you work slowly, fast or how?
A. It was done as fast as the weather would permit.
Q. Was there any delay on the part of Enlow and Son?
A. Not that I know of, no.
Dep. Q. Did anybody hold you all up?
1-6-58 A. Not that I remember, no.
page 257 } Q. How about the catch basins?
A. We were supposed to pour them as high as we could. We had a depth to go by from the Highway Department Inspector.

Q. Did you do that in accordance with the instructions set up by the State Highway Inspector?
A. Yes.
Q. And Mr. Higgerson?
A. Yes.
Q. Did they ever make any complaint about the manner in which you were doing the work?
A. Not to me.
Q. Did they ever make any complaint about how anybody else was doing the job?

Mr. Kellam: I object to that as not within his knowledge.

Herman Arthur Enlow.

A. I was foreman on the job and it would have come to me first.

By Mr. Fine:

Q. Did you continue to work in accordance with the specifications until Higgerson Brothers stopped paying you money?

Dep. 1-6-58 page 258 } Mr. Kellam: I object to that as leading and improper and suggests something that has not been established in evidence.

Mr. Fine: The record is abundant with evidence that Higgerson Brothers stopped paying them.

(The question was read as follows):

"Q. Did you continue to work in accordance with the specifications until Higgerson Brothers stopped paying you money?"

A. Yes, based on my knowledge.

* * * * *

Dep. 1-6-58 page 263 } HERMAN ARTHUR ENLOW, having been previously sworn and examined, was recalled for further examination and testified as follows:

DIRECT EXAMINATION.

By Mr. Fine:

Q. Mr. Enlow, state your full name, please.

A. Herman Arthur Enlow.

Q. Mr. Enlow, I believe you are the mechanical man behind Enlow and Son?

A. That is right.

Q. How long have you been doing the kind of work you did on this Ritter job at High Street and Gosport Road?

A. Somewhere in the neighborhood of thirty-five years.

Q. There has been some mention about your being inexperienced. Is that true, or not?

A. It is untrue.

Q. Before you were connected with Enlow and Sons, give us some of the places you have worked.

Herman Arthur Enlow.

A. Pinkston Company, 1805 County Street, approximately four years.

Q. And prior to that?

Dep. 1-6-58 page 264

A. Brown, Hill and Long, North Carolina, approximately two and a half years.

Q. And before that where were you?

A. I was with J. A. Jones Construction Company out of Charlotte.

Q. Are these firms which you have mentioned and referred to, just small two by two concerns or large concerns?

A. I would consider them large firms. J. A. Jones, I believe, is one of the largest building contractors on the east coast. Brown, Hill and Long I would call medium contractors. Mr. Pinkston has been in business here about forty years.

Q. This job you had done, was it under your personal supervision?

A. Yes.

Q. Were you there every day? ?

A. I was on the job every day from the time the job started.

Q. Until you completed?

A. Yes.

Q. Something was said about your first job.

A. It may have been the first of the corporation, yes.

Q. Was it your first job, or not?

A. No.

Dep. 1-6-58 page 265

Q. How long have you been doing this kind of work?

A. Approximately thirty-five years. I started out when I was fifteen years old and I am fifty-two.

Q. Did you do the work well, or not?

A. We did the work the very best we possibly could.

Q. I am not asking you whether you did it well, but whether the result was good.

Mr. Kellam: I object to the question as leading.

By Mr. Fine:

Q. Was the work good or bad.

A. I think it was good. I would not say it was bad on the witness stand.

Q. If it was bad you would testify truthfully?

A. Yes.

Q. Did you have any complaint from T. E. Ritter or

Higgerson Brothers or the State Inspector in connection with the result of the work?

A. I had no complaint from T. E. Ritter or the State Highway Department.

Q. How about the time element, was the work done ahead of time, behind or on time?

A. The work was done two months before the paving was started. The pipe was all completed and we had concrete to put in and it was done two months before the paving.

Dep. 1-6-58 page 266 }

Q. Who held the work up?

A. T. E. Ritter Corporation. They were the prime contractors.

Q. How about the drop inlets, could they have been done before the paving?

A. No.

Q. Were you twenty-four hours late or ahead of time?

A. I would say I was ahead of time.

Q. How many days were you ahead of time?

A. Approximately two months before any paving was started.

Q. When was the first time you quit the job?

A. When I completed it.

Q. Why did you do it, was it on account of his refusing to pay the payroll? Why did you not complete it?

A. Because he didn't want to make the payroll.

Mr. Fine: You may examine, if you wish.

CROSS EXAMINATION.

By Mr. Kellam:

Q. I show you Plaintiff's Exhibit 1—

Mr. Fine: We object to Exhibit 1 and any question in reference to it because it's not in issue in this case.

Dep. 1-6-58 page 267 }

By Mr. Kellam:

Q. I show you Plaintiff's Exhibit 1, January 6, 1958, and on the first page is that your signature?

A. Yes.

Q. On the second page is that your signature?

A. Yes.

Q. Then the statement on the fourth page, is that your signature thereon?

A. Yes.
Q. Are they copies of reports that you filed?
A. To the best of my knowledge, yes.

Mr. Fine: I submit this exhibit has nothing to do with it. It is a report to the State Corporation Commission of 1956, another report of 1957, and has to do with issuance of stock, etc., and it is immaterial to the issues in this case. My friend wants to introduce that but I can't understand why except to muddy the waters.

And further this deponent saith not.

R. L. EDMONDSON,

Dep. 1-6-58 page 268 } a witness herein, having been previously sworn and examined, was recalled for further examination and testified as follows:

DIRECT EXAMINATION.

By Mr. Kellam:
Q. I believe you were given a little time to check the diaries to determine whether the name of Enlow and Son was referrred to, or whether the name of Higgerson Brothers was referred to. Have you found any reference to them?
A. No, I didn't refer to anybody by name except the contractor.
Q. The same thing applied to the weekly reports did it not?
A. Yes.
Q. Would you have T. E. Ritter's name listed on the weekly reports?
A. That is the one that is listed on there, yes.
Q. That is the only one listed on it?
A. Yes.

Mr. Kellam: That is all.

And further this deponent saith not.

The Commissioner: Is there anything else, gentlemen?

Dep. 1-6-58 page 269 } CROSS EXAMINATION.

R. L. Edmondson.

By Mr. Fine:

Q. Even though your notes referred to the name of the contractor, if someone was on the job and was slow you would have on there, "Contractor slow," or something like that?

A. I don't know. If it was important to identify them I would do so by name.

Q. Even though there was a delay on the job or it was being done improperly, you would have that noted?

A. That is correct.

Q. That is your job?

A. Yes.

Q. You were out on that job how often?

A. Every day.

Q. Can you tell us, regardless of your notes, whether there was any delay or any inefficiency in connection with the work done by Enlow and Son?

A. There was none.

Mr. Fine: Thank you, sir. That is all I want.

And further this deponent saith not.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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